

**Limbach Company and Sheet Metal Workers, Local Union No. 24, International Association, AFL-CIO. 9-CA-34663**

May 30, 2002

**DECISION AND ORDER**

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN  
AND BARTLETT

On March 31, 2000, Administrative Law Judge Nancy M. Sherman issued the attached decision. The Respondent filed exceptions and a supporting brief. The Charging Party filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions and to adopt the recommended Order as modified.<sup>2</sup>

**ORDER**

The National Labor Relations Board adopts the recommended Order of the administrative law judge, as modified below and orders that the Respondent, Limbach Company, Columbus, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

<sup>1</sup> The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In addition, some of the Respondent's exceptions imply that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. Specifically, the Respondent contends, inter alia, that the judge has found Sec. 8(a)(3) violations in all of the Sec. 8(a)(3) cases she has decided since January 1973, save one. On careful examination of the judge's decision and entire record, we are satisfied that the Respondent's contentions are without merit. Assuming arguendo that the Respondent's statistics regarding the judge's record on Sec. 8(a)(3) cases are accurate, they do not demonstrate bias. As the Fourth Circuit has stated, a judge should not be "rate[d] by the percentage of times he or she rules on a given side of a case. To evaluate an ALJ's impartiality in this way amounts to judging [his or her] record by mere result or reputation. In reality, such statistics tell us little or nothing." *Fieldcrest Cannon, Inc. v. NLRB*, 97 F.3d 65, 69 (4th Cir. 1996). Accord: *Eldeco, Inc. v. NLRB* 132 F.3d 1007, 1010 (4th Cir. 1997). Significantly, such statistics "do not tell us whether the ALJ decided individual cases correctly. . . ." *Fieldcrest Cannon, Inc. v. NLRB*, supra.

<sup>2</sup> We shall modify the judge's recommended Order in accordance with our recent decision in *Ferguson Electric Co., Inc.*, 335 NLRB 142 (2001), and we shall substitute a new notice in accordance with our recent decision in *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001).

1. Substitute the following for paragraph 2(d).

"(d) Preserve and, within 14 days of a request or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order."

2. Substitute the attached notice for that of the administrative law judge.

**APPENDIX**

**NOTICE TO EMPLOYEES**

**POSTED BY ORDER OF THE**

**NATIONAL LABOR RELATIONS BOARD**

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

**FEDERAL LAW GIVES YOU THE RIGHT TO**

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten you that you will be discharged if you are not removed from the position of union steward.

WE WILL NOT discourage membership in Sheet Metal Workers, Local Union No. 24, International Association AFL-CIO, by discharging you, or otherwise discriminating in regard to your hire or tenure of employment or any term or condition of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights under the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Rosemary Taylor reinstatement to her former job or, if this job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Rosemary Taylor whole, with interest, for any loss of earnings and other benefits she may have suffered by reason of her termination.

WE WILL, within 14 days from the date of the Board's Order, remove from our files all reference to Rosemary Taylor's unlawful discharge, and WE WILL, within 3 days

thereafter, notify her in writing that this has been done and the actions and matters reflected in these documents will not be used against her in any way.

#### LIMBACH COMPANY

*Mark Mehas, Esq.*, for the General Counsel.

*James M. L. Ferber, Esq.*, of Columbus, Ohio, *Scott Ferber, Esq.*, then of Columbus, Ohio, and *Martin A. Keyser, Esq.*, of Pittsburgh, Pennsylvania, for the Respondent.<sup>1</sup>

*Jerry Spicer, Esq.*, of Dayton, Ohio, for the Charging Party.

#### DECISION

##### STATEMENT OF THE CASE

NANCY M. SHERMAN, Administrative Law Judge. This case was heard before me in Cincinnati, Ohio, on February 23–26, 1999, pursuant to a charge filed by Sheet Metal Workers, Local 24, International Association, AFL–CIO (the Union) on February 24, 1997, against Respondent Limbach Company, and a complaint issued on September 22, 1998, and amended on February 23, 1999. In its final form, the complaint alleges that Respondent violated Section 8(a)(1) of the National Labor Relations Act, as amended, (the Act) by threatening an employee with discharge if that employee was not removed from the position of union steward; and violated Section 8(a)(3) and (1) of the Act by discharging employee Rosemary Taylor because of her union activities.

On the basis of the record as a whole, including the demeanor of the witnesses, and after due consideration of the briefs filed by counsel for the General Counsel (the General Counsel), the Charging Party, and Respondent, I hereby make the following

##### FINDINGS OF FACT

###### I. JURISDICTION AND THE UNION'S STATUS

Respondent is a corporation which in Columbus, Ohio, manufactures sheet metal products for the building and construction industry. During the 12 months preceding the issuance of the complaint, Respondent sold and shipped from its Columbus, Ohio, facility goods valued in excess of \$50,000 directly to points outside Ohio. I find that, as Respondent admits, Respondent is an employer engaged in commerce within the meaning of the Act, and that assertion of jurisdiction over its operations will effectuate the policies of the Act.

The Union is a labor organization within the meaning of the Act.

###### II. RESPONDENT'S MOTION TO DISMISS

At all relevant times, Respondent has been a member of the Sheet Metal Contractors of Central Ohio (the Association). Through the Association, Respondent has at all relevant times been bound by a multi-employer collective-bargaining agreement with the Union, with respect to a contract unit which included Rosemary Taylor. With respect to grievances of the Union "arising out of interpretation or enforcement of this

Agreement," the agreement called for a grievance procedure under which (1) the grievance is to be settled, if possible, between the employer and the Union; (2) an unsettled grievance may be appealed to the Local Joint Adjustment Board, which consists of an equal member of representatives of the Union and of the Association, with both sides having an equal number of votes; the Board's decision is "final and binding" except "in the case of a deadlock"; (3) a grievance which is still unsettled can be appealed to a panel consisting of one representative appointed by the Labor Co-Chairman of the National Joint Adjustment Board ("the NJAB") and one representative appointed by the Management Co-Chairman of the NJAB; the decision of the panel "shall be final and binding" except "in case of deadlock"; and (4) a grievance which is still unsettled can be appealed to the NJAB, on which the contractors and Local 24's parent International are equally represented; the NJAB's decision is "final and binding" except "in case of deadlock." The bargaining agreement does not specify any subsequent steps in the grievance procedure, nor does the agreement include any arbitration provisions which can be invoked by one party without the other's consent.

On February 25, 1997, the Union filed a written grievance which alleged, among other things, that Respondent "interfered with performance of [Union Business Agent Donald Stiltner's] duty in appointment of Steward, Rose Taylor [and discharged] Steward Rose Taylor after demanding Agent Stiltner replace Steward Taylor." The grievance alleged that Taylor's discharge violated, among other provisions of the collective-bargaining agreement, a clause which forbids the employer to "cause any retaliation or discrimination whatsoever because of the carrying out of [the steward's] duty." Thereafter, this grievance was processed through every step of the contractual grievance procedure, and was deadlocked at every step.<sup>2</sup> By letter dated July 1, 1998, the NJAB advised Respondent and the Union that the NJAB had deadlocked as to this grievance.

The Regional Office deferred the instant proceeding to the grievance proceeding until the deadlock by the NJAB at the last step of the grievance procedure. At the hearing before me, Respondent's counsel contended that the instant proceeding should be deferred to the "decision" in the grievance proceeding, "The decision was to deadlock." Because the NJAB reached but did not decide the merits of the grievance, and because the contract did not empower the Union to obtain arbitration without Respondent's consent, I agree with the Regional Director that the instant case should be considered by me on the merits. See, *City Service Insulation Co.*, 266 NLRB 654, 661 (1983); *VanTran Electric Corp.*, 218 NLRB 43, 44–45 (1975). Indeed, Respondent's post-hearing brief does not contend otherwise.

<sup>2</sup> When the Union appealed the grievance to the Local Joint Adjustment Board, the Association elected to exercise "their right" by not convening that Board. Thereafter, by reason of the Local Board's failure to act, the Union appealed the grievance to the NJAB for a panel hearing.

<sup>1</sup> After the filing of R. Br., signed by James M. L. Ferber and Scott Ferber, Scott Ferber left the private practice of law.

### III. THE ALLEGED UNFAIR LABOR PRACTICES

#### A. Taylor's Employment History

Taylor first began working for Respondent in August 1995. She obtained this job through the union hiring hall.

At least ordinarily, a sheet metal worker works as an apprentice for 4 years, after which he or she may qualify as a journeyman. The bargaining agreement prescribes a particular minimum wage rate for journeymen sheet metal workers, without regard to levels of skill and without any provision for incentive pay. Throughout Taylor's employment with Respondent, she was classified and paid as a journeyman sheet metal worker. It is undisputed that she was unable to perform certain tasks associated with that trade. Thus, although she had learned welding during a period several years before Respondent first hired her, when she was working for Respondent she was physically unable to perform certain welding operations because of a medical condition which precluded her from making the head and neck motions necessary to open and close the hood. Moreover, she did not know how to operate the coil line, the Vulcan machine, the press brake (inferentially, the same machine as the hydraulic brake and the power brake), the burning machine, the rolls, or the lock form machines. Very few of Respondent's employees (probably, none of them) are able to perform all the duties in the shop. Seventeen-year journeyman Timothy Mitchell testified for Respondent that Taylor was not at journeyman level, and that he had expressed this opinion to foreman David A. Zeller, at all material times an admitted statutory supervisor who was Taylor's immediate superior, in late September or early October 1995, when she was assigned to work with Mitchell. Thirty-three year journeyman William Hickenbottom and 21-year journeyman Anthony Castle testified for Respondent that she had the abilities of a second-year apprentice, and Castle testified that she had difficulty in fabrication, but Castle testified that he had never voiced these opinions to management. Ten-year journeymen Jerry B. Smith (a union steward at the employer where he was working when he testified) testified for Respondent that Taylor had the abilities of a first-year apprentice, but that he had never expressed this opinion to management.

Between Taylor's initial hire by Respondent in August 1995, and her discharge on February 11, 1997, Respondent laid her off at least once for lack of work. When Respondent thereafter started to hire employees, the union hall referred her to Respondent, which rehired her. Respondent was under no contractual obligation to recall laid-off employees, and had the contractual right to reject employees who had been referred by the union hall. Foreman Zeller, Taylor's immediate superior at all relevant times, testified for Respondent that she had the abilities of a third-year apprentice. He never asked any of his supervisors to lay her off or discipline her because of her abilities. He was aware in advance of Respondent's plan to increase the size of its workforce, and never expressed any opinion to his supervisors about whether he thought she ought to be called back to work. James Ziegler, an admitted supervisor who at all material times has been Zeller's superior, testified for Respondent that Taylor had the abilities of a second or third-year apprentice (admittedly, he based this testimony on reports from

other members of management whom he was not asked to name), and that she spent most of her time in insulation of material and in hammering fittings together because they were the only things she was "really proficient at"; employee Mitchell credibly testified that the work assignments which she did receive kept her busy. Ziegler testified that Taylor "was not a bad employee, so far as employees go;" that within her capabilities she was a "fine" employee; that her only problem was coming to work on a regular basis; and that her attendance problem was not serious enough to cause her termination. At no time during her last tour of duty with Respondent (or, so far as the record shows, at any earlier time) had Respondent informed the Union that there was any problem with Taylor's job performance, nor had she been disciplined by Respondent for any reason. Respondent's counsel stated during the hearing that Respondent was not saying that Taylor's inability to perform certain jobs, and her attendance record, were reasons sufficient to cause her discharge.

#### B. Respondent's Labor Relations History

Respondent conducts operations at 6 different locations, 4 of which have collective-bargaining relationships with the Union or various other locals of the Sheet Metal Workers. With a 4-year hiatus created at the Union's instance, Respondent has had a collective-bargaining relationship with the Union at the Columbus facility since the 1960's. The Union's 1994-1997 and 1997-2000 bargaining agreements with Respondent cover both shop employees (in February 1999, about 18 in number) and field employees (in February 1999, about 35 in number). Both of these contracts include union shop clauses with an 8-day grace period. The contract unit includes assistant shop foreman/leadman David A. Zeller, admittedly a statutory supervisor. Except for unindentured apprentices, all of Respondent's shop and field personnel, including admitted statutory supervisors Zeller and shop foreman John W. Gordon, are members of the Union. Their immediate superior, sheet metal trade manager Ziegler, was a member of and held various positions (including steward) with one of the Union's sister locals between 1958 and 1982, with a 4-year hiatus when he was not working in the trade. Ziegler took a withdrawal card in 1982. Ziegler's late father and late uncle were both members of the Union. Two of Ziegler's sons, three of his cousins, and three of his nephews are all active members of the Union or a sister local. Since becoming sheet metal trade manager, Ziegler has dealt with at least 20 shop and field stewards, and Taylor is the only steward he has ever discharged. Laying Taylor to one side, neither Ziegler, nor Gordon, nor Zeller ever interfered with the union activities of any stewards.

#### C. Taylor's Appointment as Steward

Under the Union's internal rules, shop stewards are appointed by the business representative or the business manager, who are elected by the membership. In 1992, then business representative Donald Brammer, without polling the shop employees, appointed Zeller, an admitted statutory supervisor, as steward for the shop employees. At a union election in July 1996, incumbent business manager Gary Paxton and incumbent business representative Orin Sheumaker ran as a team for re-

election. Zeller actively supported Sheumaker, a personal friend. Taylor actively campaigned for Charles Frazier and Donald Stiltner, who ran as a team for business manager and business representative, respectively. During the election, Taylor told at least one of Respondent's sheet metal workers, Anthony Castle, that if Stiltner were elected, he might make her steward at Respondent's shop. When Castle expressed concern to Stiltner about such a possibility, he said that he was going to make some steward changes but had not committed to anyone. The membership elected Stiltner as business representative, for a 3-year term, and Frazier as business manager.

As discussed *infra*, after becoming business representative Stiltner removed Zeller from his position as shop steward and appointed Taylor to that position. Stiltner credibly testified that he selected Taylor to serve as steward because the Union wanted stewards to have attended a union class (open to all members) in February 1996 which instructs pupils about the duties of a steward; only three of Respondent's shop personnel (including foreman Zeller) had attended such a class; Stiltner already knew Taylor, who had attended such a class; and he felt that she would communicate with him as her steward's duties would call for. He testified that he decided to remove Zeller partly because of reports that Zeller "would come running through the shop" whenever Ziegler yelled for him, but basically because having the same individual serve as both a foreman and a shop steward "created a conflict. So, it was our philosophy to replace stewards that were also. . . foremen. . . the basic reason for [Zeller's removal] was a conflict of interest for a sheet metal worker that might have had a Union problem to come to a foreman." Respondent's post-hearing brief claims that this latter justification was "pretextual" in view of Stiltner's at least alleged failure to adhere to this policy with respect to stewards in other shops. This claim of inconsistency has little support in the probative record evidence.<sup>3</sup> In any event, the significance of this claim of pretext is unclear to me. Respondent's claim (Br. p. 4) that Frazier and Stiltner "immediately began systematically purging the Union's ranks of their opposition" not only disregards the absence of any evidence that the allegedly supervisory retained stewards supported Frazier and Stiltner, but also implies the existence of a perfectly proper reason for any "purging" which may have occurred, see *Finnegan v. Leu*, 456 U.S. 431, 441-442 (1982).

<sup>3</sup> The Union has about 60 active stewards. On occasion after Stiltner's election as business representative, the shop steward was a foreman in a "very, very small shop" where the foreman might be the only worker in the shop. Employer Kirk Williams' shop steward, John McConnell, remained as shop steward after being promoted in October 1998, to the job of sheet metal foreman; this may or may not be the job of a statutory supervisor, and Stiltner credibly testified to being unaware of McConnell's promotion. Stiltner did not replace Martina Sheet Metal shop foreman Randy Martin as steward, his position when Stiltner became business representative in August 1996, until some time in 1997 or 1998. Stiltner credibly testified that so far as he knew, Anthony Smith, Martin's successor as Martina Sheet Metal shop steward, was not a foreman. Zeller's testimony that Smith's job at Martina Sheet Metal was the same as Zeller's in Respondent's shop was based entirely on reports to Zeller from former Martina Sheet Metal employees, and on timely objection was found to be inadmissible hearsay.

I note that Stiltner denied that "politics" had anything to do with his decision-making process in appointing a steward.

The 1994-1997 collective-bargaining agreement includes the following provisions:

#### Addendum VIII

##### Union Steward

Section 1— . . . on every job. . . there shall be a Working Steward for . . . said shop. The Business Manager or Business Representative of the Union may appoint [as] Stewards. . . whomever they deem necessary.

. . . .

Section 4—[The Employer may lay a] Shop Steward off if a job is to be discontinued or temporarily halted for cause over which the Employer has no control, provided the Steward is the next to last employee. . . laid off from said. . . shop. The Steward shall be the first employee recalled or rehired by the Employer, for said job providing he is qualified to perform, after such layoff. . .

Section 5—When employees work overtime, the shop. . . steward will be asked to work overtime on any job for which he is qualified to perform the work.

About August 12, 1996, Stiltner advised the shop personnel that Stiltner was coming over to appoint a new union steward, because Stiltner did not like Zeller as a union steward since he was a lead man. Shop Foreman Gordon, an admitted statutory supervisor, then proposed to Zeller (who is in the contract unit but is an admitted statutory supervisor) that Gordon and Zeller ascertain which employees would like to be union steward and would be qualified to do anything in the shop; Gordon testified that this "qualification" requirement was due to the contractual preference afforded stewards in the assignment of overtime work. Gordon asked Zeller and another, unidentified journeyman (perhaps, William Hickenbottom) to poll "the people out there" and find out whom they wanted as steward.<sup>4</sup> The persons who received this assignment came back to Gordon and reported that they had been told that "they decided we had three people that would—would accept as union steward"<sup>5</sup>—journeymen Brian Withrow, Jerry Smith, and Greg Combs. Then, Gordon gave their names to Stiltner and said that Gordon would like to see one of them named as union steward, because "they were qualified and they were all-around sheet-metal journeymen." Stiltner said that he would go out and talk to the people, and pick one, and come back and tell Gordon whom Stiltner was appointing.<sup>6</sup>

Thereafter, during an August 14 conference in Gordon's office with Gordon, Ziegler, and Zeller, Stiltner said that he intended to replace Zeller with Taylor as steward. Ziegler asked why. Stiltner said that it was a conflict of interest to have the same person be both the shop foreman and the steward. Ziegler said, untruthfully, that Zeller was not a foreman any more.

<sup>4</sup> Hickenbottom, an incumbent employee who testified for Respondent, was not asked about this matter.

<sup>5</sup> The quotation is from Gordon's testimony.

<sup>6</sup> The complaint does not allege that any conduct described in this paragraph violated the Act.

Stiltner said that this “still doesn’t have any bearing at this point in time on my decision. I’m still making Rosemary Taylor the steward.” Ziegler replied that Stiltner could appoint anyone but Taylor to act as steward, and that if he did appoint her, he could “take her [obscenity] with [him] and leave right now, and I’ll pay her out of my pocket.”<sup>7</sup> Stiltner said that he did not tell Ziegler whom to appoint as foreman, that this was Respondent’s job; and that Ziegler was not going to tell Stiltner, the Union’s representative, whom to appoint as steward. Stiltner said that he was not taking Taylor anywhere, that she was going to remain there in the capacity of steward. Gordon said that Taylor would be a bad choice as steward, because she did not come to work regularly, the steward’s duties included putting union labels on company products which were sent out of state, and if these products were sent out of state without union labels, such products did not have to be accepted. Ziegler did not explain why he did not want Taylor as steward.<sup>8</sup>

On the following day, August 15, Stiltner returned to Ziegler’s office, carrying with him a letter to Respondent formally appointing Taylor as shop steward. Ziegler’s prehearing affidavit states that he was “dismayed” at Taylor’s appointment as steward.<sup>9</sup> When Stiltner entered Ziegler’s office, Ziegler asked him if he had changed his mind about Taylor’s appointment as steward. Stiltner said no, and gave him the letter of appointment. Ziegler told Stiltner to get out of Ziegler’s office; Ziegler testified that he issued this order because he was upset by Stiltner. Stiltner thereupon left the building. Thereafter, Stiltner advanced to the Union an oral complaint that Ziegler was not allowing Stiltner to do his job as business agent; action taken in connection with this complaint is discussed infra Part III D 4. Former employee Mitchell, who testified for Respondent, credibly testified that when he conversed with Zeller after his replacement as steward by Taylor, Zeller “was really hot

about it. He couldn’t understand . . . why he was being replaced.”

*D. Events Between Taylor’s Appointment as Steward and the Week before her Discharge*

1. Taylor’s assignment to layout and welding work

On August 17, Gordon told Taylor that she would no longer be working in the front tables, where she had been working since the beginning of her last tour of duty with Respondent about a year earlier. Gordon said that she was Respondent’s new layout person. This sort of work was usually done by a machine called a plasmar, which Taylor was fully capable of operating;<sup>10</sup> if the layout work was to be performed on only one item or with respect to unusual items, it was usually done by Zeller or by other sheet metal workers who had started to work for Respondent before it acquired the plasmar machine. Taylor had not performed this kind of work since she was an apprentice; and Ziegler testified to the belief that she could not perform it at all.<sup>11</sup> When an employee is assigned a certain job which he has not performed for a while, help is generally given and always accepted. Taylor asked for help from Kenny Woods, who was filling in for foreman Zeller because Zeller was then on a second shift which Respondent was operating at that time. Woods replied that Ziegler had told him not to help her.<sup>12</sup>

<sup>10</sup> My finding that she was fully capable of operating this machine is based on her testimony. For demeanor reasons, I do not credit the contrary testimony of Zeller and of journeyman Mitchell, a former company employee who worked with her on and off for about 6 months immediately preceding her discharge.

<sup>11</sup> My findings as to Taylor’s new assignment as “layout person,” and as to her lack of experience on this work, are based on her testimony. Gordon denied telling Taylor that she would no longer work at the front tables and, instead, would be the new layout man. Gordon went on to testify that he did not “think” he gave her different jobs after she became a steward from those she had received before she was a steward, or jobs he knew she could not perform. However, he later testified that after she became steward, he gave her a layout and simple fitting and she could not do it. Moreover, although Gordon testified that Taylor “was supposed to be able to do any job in there as a sheet metal journeyman”, Ziegler testified that a sheet metal worker “continue[s] to learn all the way through” after completing his apprenticeship; Zeller testified that sometimes an employee receives an assignment he is unable to do (in which event, Zeller shows the employee how to do it, or gets another employee who could help him); and 11-year employee Hickenbottom, a company witness who had been a journeyman sheet metal worker for 33 years and had served as a temporary steward after Taylor’s discharge, testified that Zeller had sometimes given him an assignment which he had to be shown how to perform. In view of the foregoing, and for demeanor reasons, I credit Taylor.

<sup>12</sup> This finding is based on Taylor’s uncontradicted testimony, which on timely objection was received only to show Woods’ motivation for refusing to help her and not to show that Ziegler had in fact told him this. Woods did not testify. Taylor testified without contradiction that as far as she knew, during the two or three weeks when Zeller was on the second shift, Woods had all the duties and capacities that admitted supervisor Zeller had. However, the General Counsel’s posthearing brief does not contend that Woods was at that time a supervisor and, therefore, his statement as testified to by Taylor is not probative of

<sup>7</sup> My findings in this sentence are based on Stiltner’s testimony, partly corroborated by Zeller. For demeanor reasons, I do not credit Ziegler’s, Zeller’s, or Gordon’s denial of the obscenity. Zeller’s prehearing affidavit states that Ziegler asked Stiltner “that anyone else be appointed as steward, other than Taylor.” Because Zeller’s affidavit is similar to Stiltner’s testimony and was given closer to the event than Zeller’s testimony, I accept his affidavit rather than his testimony that “I think [Ziegler] said, ‘Is there anyone else out there that you could appoint steward?’”

<sup>8</sup> This finding is based on Stiltner’s testimony. Ziegler testified to saying that the bargaining agreement called for the steward to be the next to last person to be laid off, and that Ziegler did not feel that Taylor was capable of doing all of the shop functions that would need to be done if there were only two people in the shop. However, Ziegler’s testimony that he so stated to Stiltner on this occasion was not corroborated by Gordon, and Zeller (who, however, was late to the meeting) testified that he did not hear Ziegler say that. Neither Gordon nor Ziegler corroborated Zeller’s testimony that Ziegler referred to her attendance. In view of this absence of corroboration, and for demeanor reasons, I credit Stiltner.

<sup>9</sup> However, at the hearing Ziegler testified that it was not a fair statement that he did not want her to continue as steward, that he really had no desire that she be removed as steward, and that if Stiltner had given Ziegler a choice between Taylor and any other employee, Ziegler would have agreed to allow her to remain as steward. Then, he testified that he would have preferred the same steward he already had—namely, Zeller.

Taylor testified that after this incident, employee Combs came over to try to help her on the layout job, whereupon “John Ziegler, the shop foreman,” (emphasis added) came running over and yelled at Combs not to help Taylor out at all. Combs did not testify. James Ziegler, who is Respondent’s sheet metal trade manager, was not asked about this alleged incident. John Gordon, who is Respondent’s shop foreman, testified that he knew of no situation where Taylor asked people for help on how to do something and they refused to help her, and that “I don’t think” Taylor ever asked him for help. I make no findings as to the Combs incident; I note, however, that Taylor was generally a more honest witness than Gordon.<sup>13</sup>

A few minutes later, Gordon instructed Taylor to shear a shear list and to buck weld it together. Taylor was able to perform the shearing operation, but, as she had told Gordon previously, she was physically unable to perform the welding operation, because she had a cervical laminectomy 10 years earlier and, in consequence, risked paralysis if she performed the neck movements necessary to shut the hood.<sup>14</sup> At this point, Taylor began to weep. She went into Gordon’s office and told him that she did not want to be treated this way and was going to see an attorney. Gordon thereupon sent her to Ziegler’s office.

## 2. Threats of retaliation if Taylor remained as steward

### a. By Ziegler

Upon entering Ziegler’s office, Taylor said that she was upset because she had been asked to do layout and welding work, and asked “. . . why are you doing this to me?” Ziegler said that Stiltner, whom Ziegler described in obscene language, was not going to tell him who “my steward” was going to be. Ziegler said that he did not want Taylor as steward, that he would only accept Zeller because Stiltner was trying to put “his own people” in as stewards, and that Ziegler did not want Taylor as steward because, if there came a time when only two people were in the shop and it came to the point where Respondent needed layout and welding work, Taylor would not be able to do the job. Ziegler said that the only reason Stiltner had removed Zeller was that Zeller was friends with the old business agent. Ziegler said that he would send Taylor out to work in the field in order to get rid of her.<sup>15</sup> Ziegler said that he wanted Taylor to telephone Stiltner that she was resigning as steward, and that if she did not resign she would get more of the same. He said that he had or would put a statement into her file that she could not do layout work. He went on to say that if she had not been appointed a steward he never would have asked her to do that job. Ziegler said that he was going to write

statements made by Ziegler (see Rules 801 and 802 of the Federal Rules of Evidence). Ziegler denied telling Combs, or any other person, not to help Taylor doing her work.

<sup>13</sup> Taylor’s virtually contemporaneous “diary” notes, which attribute this remark to Gordon, were offered and received for impeachment purposes only.

<sup>14</sup> My findings that he gave her this welding assignment, and that she had previously told Gordon about this physical problem, are based on her testimony. For demeanor reasons, I do not credit Gordon’s denial.

<sup>15</sup> Only a shop employee can serve as a steward for shop employees. Inferentially, Respondent’s field employees already had a steward who was a field employee.

Stiltner a letter rejecting her as “his [i.e., Ziegler’s] Union steward.”<sup>16</sup> (No such statement was ever put into her file, and, so for as the record shows, no such letter was ever sent.)

As previously noted, among the steward’s duties is the duty of affixing union labels to Respondent’s products before they leave the shop. The absence of these labels may cause out-of-state “union people” to refuse to install the products. If the union labels are lost or mislaid after the steward has signed for them, the steward is deemed responsible. On August 18, Taylor signed for a batch of union labels. Before the start of the workday on August 19, Gordon told her to resume work on the layout tables. She refused. Gordon told her that because she had signed for the union labels, Respondent could not send her out in the field. During this conversation, Ziegler walked in and said that Taylor had “screwed up” when she signed for the labels, and “now it’s war.” Gordon and Ziegler told her to telephone Stiltner and resign as steward, and Gordon told her to tell Stiltner to come out and get his labels. Then, Ziegler and Gordon left the office.<sup>17</sup>

As instructed by Ziegler and Gordon, Taylor telephoned Stiltner and said that she was resigning as steward. Stiltner asked to talk to Gordon. Gordon refused to come in and talk to him, but Ziegler took the phone. Stiltner told Ziegler that Taylor was very upset about having to do layout, and that Ziegler should stop harassing her.

After finishing his telephone conversation with Stiltner, Ziegler came out to Taylor and told her not to touch the metal. She asked what he wanted her to do. He said, “I don’t care what you do, call [Stiltner].” Then, Taylor returned to Gordon’s office and, in his presence, telephoned Stiltner and told him she was resigning as steward. Stiltner said that he would be out that way to reassign someone else.<sup>18</sup>

Taylor then went to the plant floor and began to work. When Ziegler approached her and asked what was going on, Taylor said that Stiltner had told her that he would be out later that day to reassign someone else. Ziegler said, “. . . fine, you can go

<sup>16</sup> My findings as to this conversation are based on a composite of Taylor’s testimony and credible parts of Ziegler’s testimony. Ziegler testified that she went into his office because she was unable to do “a project that involved layout and some welding,” and that she never told him that she could not do the welding for some medical reason. Ziegler further testified that he told her to “go back down and forget about the fitting, you’ll have to get somebody else to do it. [I settled] her down, told her to. . . go back to doing what she normally did.” He denied describing Stiltner to Taylor in obscene language, denied telling her that if she did not resign as steward she would get more of the same and would be put in the field, and denied telling her that if she had not been appointed steward she never would have been assigned layout work. For demeanor reasons, I credit Taylor. See also, *infra* Part III G 1.

<sup>17</sup> My findings as to this August 19 conversation are based on Taylor’s testimony. Ziegler denied making the “now it’s war” statement and denied ever asking Taylor to resign as steward. Gordon denied being aware of any situation where Ziegler interfered with Taylor’s role as a union steward. For demeanor reasons, I credit Taylor.

<sup>18</sup> My findings in this paragraph are based on her testimony. For demeanor reasons, I do not credit either Gordon’s denial that he was present during her telephone conversation with Stiltner or Ziegler’s denial that he told her not to touch the metal.

ahead and work now. . . I can't promise you a job forever, but as long as I have work you'll have a job."<sup>19</sup>

*b. By Rudowski*

The executive vice president and principal officer of the Association is Robert Rudowski. The General Counsel contends, and Respondent denies, that he was an agent of Respondent; this issue is resolved *infra* Part III G 2. On August 20 or 21, Ziegler telephoned Rudowski about Taylor. As Respondent's witness, Rudowski testified that Ziegler said he was concerned that Taylor might be having some problems at the firm, but he did not want to approach her. Rudowski testified at one point that Ziegler "called and asked me to come down;" and elsewhere, testified that Rudowski "volunteered to come down. . . I said, would you like me to come down and I could talk with her and possibly find out what the problem was. [Ziegler] said fine, come on down. . . . I suggested to [Ziegler] do you want me to come down and talk with her. [Ziegler said], fine. If you want to, fine." Rudowski testified that nobody from Respondent gave him any instructions as to what he was supposed to do in that meeting, or authorized him to make any commitments on Respondent's behalf, and that Ziegler put no limitations on what Rudowski could say to her.

When Rudowski arrived at the plant later that day, Ziegler told him what office to go to and said that he would have Taylor go there also. Then, Ziegler came up to Taylor at work and told her that he wanted her to go into that room and talk to Rudowski.<sup>20</sup> Rudowski testified that by the time she entered this room, he knew she was the union steward in the shop. Only she and Rudowski were present at that meeting. Rudowski told Taylor that his "whole objective" in being there was to try to resolve "the problem" before it went any further. Rudowski said that if Taylor would give up being steward, he would make sure that she was not fired, transferred, or put back on the lay-out tables again. He said that Ziegler would not accept anyone but Zeller for the union steward's position. Rudowski said that Ziegler had tried to say that Taylor's ability to do the work was insufficient, but that Rudowski had told Ziegler to stop there, that this did not hold water because she had been employed by Respondent for a year and Ziegler could not try to say that now. Rudowski asked Taylor to resign as steward. He said that if she decided not to resign as steward and she really wanted to be the steward he would make Ziegler "abide," but Rudowski would lose his 22-year friendship with Ziegler for making him do something he did not want to do. Rudowski said that if she resigned as steward she would not be fired or laid off or transferred, and if she later got laid off he would personally help her to get a job somewhere else. At the end of this conversation, Taylor hugged Rudowski and thanked him for coming over. During this conversation, Taylor brought up the fact that some-

one had let the air out of the tires of her truck when it was parked in the plant parking lot that morning.<sup>21</sup>

Inferentially after ending her conversation with Rudowski, Taylor telephoned business agent Frazier at his office in Dayton, Ohio. She said that she was calling from Respondent's Columbus, Ohio plant, that she was tired of being harassed and put through what she was going through, and that she wanted to resign as steward. Inferring that someone else was with her while she was calling, he asked her if somebody else was listening. She said yes, that Rudowski was there, and that he wanted to talk to Frazier. Then, Rudowski came on the line and identified himself. He went on to say that if Taylor resigned as union steward, she would work for Respondent as long as it had work, and that he thought it would be best for everybody if she resigned as steward. Frazier replied that he did not know the particulars, but that until he talked to Stiltner, Taylor was still the steward as far as the Union was concerned. During this conversation, and/or a conversation with Frazier which occurred on February 19, 1997 (see *infra* Part III E 5), Rudowski said that he was representing Respondent and Ziegler.<sup>22</sup>

3. Other alleged harassment of Taylor as steward

On August 24, when Taylor was leaving the plant for lunch, another employee drew her attention to the fact that her truck, which was parked in the plant parking lot, had been keyed. When she went to Gordon's office in order to telephone the police, she told him that she thought her truck had been keyed at work; he ignored her. After examining the truck bed, the police issued a report stating that because it had rained the night before, the keying could not have been done at that time and must have been done in the plant parking lot.<sup>23</sup> On undisclosed dates between August 24 and September 3, when employees came to her with questions or problems, Zeller, Gordon, or

<sup>19</sup> My finding that he made this remark is based on her testimony. For demeanor reasons, I do not credit his denial; see also, *infra* Part III G 1.

<sup>20</sup> This finding is based on Taylor's testimony. For demeanor reasons, I do not credit Ziegler's rather uncertain denial, for demeanor reasons and because of Rudowski's contradicted testimony that the very purpose of his coming to the plant and being assigned the use of an office was to talk to Taylor.

<sup>21</sup> My findings as to what occurred during this conversation are based on Taylor's testimony, except that Rudowski testified about the hug and the thanks. His credited testimony as to the hug and thanks is difficult to reconcile with his testimony that she was distraught by her perceived mistreatment by her fellow employees and told him that she had never wanted to be a steward, to which he replied that she should talk to the Union if she had problems about being a steward. I note that Rudowski testified to the belief that Ziegler was unwilling to speak to Taylor himself because of his commitments during a meeting which (the record shows) did not occur until about 2 weeks after Rudowski's conference with Taylor (see *infra* Part III D 4). Moreover, although he testified that during their August conversation she complained about her truck's being keyed (i.e., intentionally scratched, likely with a sharp metal object such as a key), she credibly testified that she did not find out about the keying until several days later. Because Rudowski's testimony about the hug and thanks is more consistent with her version of the conversation than with his, and for demeanor reasons, I do not credit his denials of the remarks which she attributed to him about the steward issue.

<sup>22</sup> My findings in this paragraph are based on Frazier's testimony. For demeanor reasons, and the reasons set forth *supra* fn. 21 and *infra* fn. 26, to the extent inconsistent with her testimony I do not credit Rudowski's testimony that he never said if Taylor resigned as steward, she could work for Respondent as long as she wanted to.

<sup>23</sup> This finding is based on Taylor's testimony, which on timely objection was not received to show when the keying had been done.

Ziegler would scream and yell at her from across the room to go back to work, although the bargaining agreement forbids the employer "in any manner, [to] interfere with the performance of [the steward's] duty," which includes reporting to the Union and to the employer "any grievance, dispute or controversy involving the interpretation or application of the terms of the agreement, that [the steward] has been unable to adjust."

Taylor testified that during this period, Gordon refused to permit her to use his office telephone to advise Stiltner about overtime requests and assignments even though the bargaining agreement requires the steward to report these matters to the Union. Gordon had permitted Zeller to use Gordon's phone for such purposes when Zeller was steward, and there is no pay phone in the plant; Taylor testified that when she wanted to make such calls, she had to "sneak back" to the loading dock and use the phone back there. Gordon's denial that he did this was corroborated by Mitchell and Zeller. As to this matter, I credit their testimony.

#### 4. The September 3, 1996 conference regarding Taylor's treatment as steward

At least ordinarily, complaints about Respondent's conduct toward employees and/or the Union are not initially submitted in writing, but are initially submitted and discussed orally. Stiltner contacted Respondent by telephone to complain about Ziegler's August 15 instructions to leave his office upon Stiltner's refusal to withhold Taylor's letter of appointment as steward (*supra* Part III C). Stiltner also made similar contact on the basis of telephoned complaints to him from Taylor that there was a "harassment problem." However, Ziegler initially refused to meet with Stiltner about these matters, and Stiltner concluded that "it wasn't going anywhere." Stiltner eventually contacted Rudowski and advised him that "there were problems." Rudowski testified for Respondent that he thereupon "suggested that all four of us get together and have an informal meeting," according to Respondent's brief (p. 6) "to resolve the dispute." Ziegler testified that at least a purpose of this meeting was to settle an issue between himself and the Union regarding Ziegler's feeling that Taylor was not capable of handling the duties of an employee who was going to be the second to last employee in the shop.

On September 3, a meeting as to these matters was held in Rudowski's office; Ziegler testified that it was his idea to meet at Rudowski's office, because Rudowski's office "was more convenient, and it's a bigger area [than Ziegler's office] for somebody to be there."<sup>24</sup> Present at this meeting were Rudowski (who remained throughout), Ziegler, Stiltner, union business agent Douglas Biggs, and Frazier. Rudowski said that he was trying to resolve this problem with the union steward at Respondent's facility on behalf of Ziegler. Ziegler said that owing to the contract clause providing that the union steward is

the second to the last person laid off, he was concerned because Taylor was not capable of doing all the journeymen's work throughout the shop. Stiltner said that if it ever got down to a point where Respondent had low employment, and there were jobs which Taylor could not do, that "we would discuss it."<sup>25</sup> Ziegler showed Frazier and Stiltner Taylor's work record, and Frazier said that it was not a very good work record. The transcript of testimony fails to show what documents Frazier saw, or what led him to reach his conclusion about Taylor's work record. The parties discussed the Union's claim that Taylor was being "harassed" and was being rendered unable to perform her duties as steward. Also discussed were the Union's claim that a particular job assignment had not been "fair" to Taylor, and the incident where her vehicle had been keyed. Rudowski proposed an agreement that the harassment would stop, that Taylor would be recognized as the steward in that shop, and that no further harassment or impediment of her performing her duties would occur. Ziegler credibly testified, with corroboration by Stiltner, that those present, including Rudowski, came to a "mutual agreement" that Taylor would stay on as steward. The eventual resolution was that the harassment of Taylor would stop, and that Ziegler would recognize Taylor as the steward at that shop and accepted that fact. Thereafter, Stiltner so advised Taylor as to the agreed-upon recognition, at least.<sup>26</sup>

#### 5. Other alleged incidents involving Taylor

As previously noted, the bargaining agreement provides that when employees work overtime, the steward is to be asked to work overtime on any job for which the steward is qualified to perform the work. The record is insufficient to resolve the at best peripheral issue of whether Zeller followed this practice after Taylor became steward.<sup>27</sup> On the morning of January 17, 1997, Taylor and Zeller got into an argument because he had asked six other employees, but not Taylor, to work overtime. When he did ask her, about midday, to work overtime, she asked him why he had waited to ask her instead of asking her when he asked everyone else. Zeller thereupon started screaming at her, and told her that if she worked that day she was taking work away from the apprentice. She said that a steward

<sup>25</sup> This finding is based on Ziegler's testimony. Rudowski testified that "I don't remember that" the Union made such a representation. To the extent that this may constitute a denial, for demeanor reasons I credit Ziegler.

<sup>26</sup> My findings as to what was said during the September 3 conference, are based on a composite of credible parts of the testimony of Ziegler, Rudowski, Stiltner, and Frazier. In view of Rudowski's testimony regarding the "resolution" reached at the meeting, that sheet metal trade manager Ziegler would accept the fact that Taylor was a steward, I do not credit Rudowski's testimony that nobody claimed a supervisor was interfering with Taylor's duties as the union steward.

<sup>27</sup> Respondent's records of employees' overtime work while she was steward are not in evidence. Zeller testified that he uniformly followed the practice of initially offering available overtime work to Taylor, who usually declined. Taylor's testimony suggests that she believed he did not uniformly do this, perhaps because of her rejection of overtime during her father's terminal illness in October 1996. The testimony of several unit employees shows that they believed she turned down offers of overtime, either always or with undue frequency.

<sup>24</sup> Rudowski's office is about 5 miles from Respondent's facility; his office and the union hall are both located in Columbus, but the record otherwise fails to show the distance between them. Stiltner ordinarily conducted grievance conferences at the union hall, but he had never before had a conference with Respondent about a grievance. Rudowski had previously had similar meetings in his office with union representatives and other employees.

needed to be there. Reddening, he said that he was sick and tired of her attitude and her mouth, and that there had been no steward on duty during the preceding night shift. She said that there had in fact been a steward, alternate steward Greg Combs. Zeller said that Combs had not been officially appointed. She said that she had appointed him. Then, Zeller screamed at her and obscenely accused her of having obtained her steward's position by having sexual relations with Stiltner and other union representatives.<sup>28</sup> Later, he apologized to her for not asking her to perform overtime work.

Employee Angela Mae Rodgers testified that Taylor said that she had thought about putting battery acid into Zeller's coffee. On direct examination, Rodgers testified that Taylor made this statement about a month before her discharge (which occurred on February 19, 1997), but on cross-examination, Rodgers initially testified that Taylor made this statement about a week before her discharge, and thereafter Rodgers testified that she did not recall roughly when the battery-acid statement was made. Taylor testified that she did not remember whether she said this, but that she liked Zeller "until all this happened." In view of Rodgers' admission that she did not tell Zeller about this alleged statement, I do not credit her testimony that "I didn't think she was joking, but. . . I didn't know if she would do it," and conclude that Rodgers took this remark either as a joke or as mere rhetoric.<sup>29</sup>

Rodgers further testified that about February 14, 1997, Taylor brought cupcakes into the shop, said that the cupcakes with a particular color on top contained antabuse, and further said that she hoped Zeller and Mitchell would eat them and get deathly sick. Rodgers went on to testify that she did not know whether Taylor told anyone else which cupcakes were drugged, that Rodgers told "a few people. . . shop employees" about them, that she did not remember whether she told Zeller, but he was not going to eat them anyway, and that she did not tell anyone else from management (including Gordon) about the allegedly drugged cupcakes. Rodgers did not eat any of the cupcakes; other, unidentified, personnel ate some but not all of the cupcakes, and nobody got sick from eating them. Alleged named targets Zeller and Mitchell testified for Respondent, but were not asked anything about the cupcake incident. In view of Rodgers' admitted failure to advise Gordon of this alleged incident at the time it occurred, and her admitted uncertainty as to whether she reported it to Zeller (allegedly a named target), although Zeller spent almost all and Gordon spent some of their working time there, and for demeanor reasons, I credit Taylor's testimony that it was not she who made the drugged-cupcake report (which she testified was intended as a joke by the person

who did make it), and that Taylor had bought the cupcakes rather than making them herself.

Also, Rodgers gave honest testimony, without objection or limitation, that on a date she was not asked to give, she "had heard" that Taylor had made the untrue statement that Rodgers and Zeller were sleeping together. Rodgers was not asked when or from whom she "had heard" about this report, and Taylor was not asked about the statement thus attributed to her.

Respondent does not contend that the alleged battery-acid remark, the cupcake incident, or the alleged report about Rodgers and Zeller had anything to do with Taylor's discharge.

#### *E. Taylor's Discharge*

1. The survey seeking Taylor's replacement as steward; the February 18, 1997 safety meeting

On February 12, 1997, employee Mitchell approached a number of the shop personnel and asked them several questions, which Mitchell had written down in advance, relating to the respective workers' opinion of Taylor as steward. All 14 of the personnel who responded to Mitchell's questions wanted Taylor's removal as steward, and wanted a new steward to be appointed "with the popular consent of the members now employed in this shop." On February 13 or 14, Mitchell presented this "survey" to Stiltner, who displayed extreme annoyance. After being advised by Zeller that this "survey" was floating around the shop, Ziegler asked Mitchell what was going on. When Mitchell explained, Ziegler told Mitchell that his conduct could put him "in a lot of jeopardy with the Union." Thereafter, and after Mitchell had given Stiltner this "survey," Ziegler telephoned Stiltner that Ziegler was aware of the results of the survey, that it showed that other employees felt that Taylor could not perform her duties as steward, and that Stiltner needed to come down and deal with the problem Ziegler had in the shop with her as the steward. About Friday, February 14, Stiltner told Ziegler that Stiltner intended to return to the shop early the following week to meet with the employees around the lunch hour to discuss what the problem was.

Respondent has a practice of holding weekly safety meetings, usually conducted by Zeller, among the employees. Such a meeting was conducted by Zeller on Tuesday, February 18, after the 11:30-noon lunch break. After concluding his statements to the assembled employees, Zeller asked Taylor if she had anything to add. She brought up Mitchell's "petition" and said that she wanted to tell her side of the matter. Zeller said, "... what's this got to do with safety?," and that "we don't want to hear this." Taylor said that she believed Zeller had helped Mitchell in preparing and circulating the petition. Taylor went on to say that Zeller had threatened to assign her for the rest of her life to insulating, which Taylor, at least, believed to be the worst job in the shop.<sup>30</sup> Zeller said that Taylor could not even do that job right.<sup>31</sup> Gordon ran out of his office and

<sup>28</sup> My findings as to this conversation are based on Taylor's testimony. For demeanor reasons, I do not credit Zeller's denials. Although several other witnesses for Respondent denied having heard Zeller make such remarks, it was not shown whether they or anyone else would have been able to overhear the conversation as testified to by Taylor. I note that the shop is frequently very noisy.

<sup>29</sup> When asked whether she had told anyone in the shop that she hated Zeller and hoped he would die, Taylor testified, "I might have, I don't know. That's something people say when they're upset. I mean, we've all said it at one time or another."

<sup>30</sup> The insulation contains fiberglass which gets under the worker's skin and causes extreme itching.

<sup>31</sup> This finding is based on Taylor's testimony. Zeller denied threatening that she would never be promoted out of insulation. To the extent that this may constitute a denial, for demeanor reasons I credit her. Employee Ronald Wilburn, Jr., who was within earshot of the begin-

told Taylor to "take this to the union hall, we don't want to hear it." The meeting then broke up, and the employees went back to work.

After Taylor had resumed her work, Zeller approached her and asked why she had accused him of having had Mitchell circulate a petition to have her removed as steward. Zeller stated that he had nothing to do with Mitchell's petition; Zeller had in fact voted in the survey, but the petition had not in fact been his idea. She obscenely said that she knew Zeller had instigated the petition. Zeller said that he had called Stiltner, and that Zeller was going to bring intra-union charges against her for accusing him of helping Mitchell with the petition. She said that she, too, was going to call Stiltner. Inferentially after Zeller left her work area, she tried to reach Stiltner by telephone. She was unable to reach him, and left a message for him to come to Respondent's facility as soon as he returned to his office. When Zeller again approached her while she was working, she asked why Zeller had said at the safety meeting that she could not insulate. He said that employee Ron Murdoch, with whom she had performed such work, had told Zeller that she could not keep up with Murdoch. Taylor thereupon asked Murdoch, who was in the area, whether he had said this; Murdoch said no. Zeller thereupon laughed at Taylor. As previously noted, Ziegler testified that Taylor was "proficient" at insulation work.

## 2. The February 18 Taylor-Zeller altercation

The fabrication of tap-collars is a job frequently performed in Respondent's shop, by a number but not all of the sheet metal workers. Zeller testified that he had never assigned Taylor to such jobs before she became steward in August 1996, that the fabrication of tap-collars was the only job he assigned her after she became union steward which she had not performed before becoming steward, and that after she became steward, he assigned her to such jobs only "once in a while." He further testified that on February 18, 1997, he had a rush job for the fabrication of round tap-collars, and that he decided to assign this job to Taylor because the job she was currently performing was less pressing than the jobs being performed by the other sheet metal workers.<sup>32</sup> A few minutes after the conversation involving Murdoch, Zeller approached Taylor with the appropriate materials and told her to fabricate the tap-collars. Taylor told him that because he had just made fun of her ability to insulate, she would not do the tap-collar job. She told him that

ning of this conversation, did not corroborate this testimony by Taylor, but he left the area before the conversation had ended.

<sup>32</sup> He testified that before February 18, 1997, he had never asked her to fabricate round tap-collars. However, he testified that after she became steward, he had asked her "once in a while" to fabricate square tap-collars, and that anyone who can fabricate a square tap-collar can also fabricate a round tap-collar. I am inclined to credit Taylor's testimony that before February 18, she had never fabricated tap-collars in Respondent's shop. In any event, Zeller admitted that in making this assignment to Taylor, he was assigning a rush order to fabricate tap-collars to an employee inexperienced in such work rather than to one of the many employees with such experience.

Although the tap-collar job required spot welding, no contention is made that her medical limitations (which involved her use of a hood) extended to the tap-collar kind of welding.

he was trying to set her up. She said that no matter what she did, he was going to say that her work was poor.<sup>33</sup> She went on to say that she was upset because during the safety meeting she had not been allowed to give her side of the story in connection with the removal petition. At this point, Zeller went upstairs, where Ziegler's office is located. Thereafter, Ziegler approached Taylor at her workbench and told her to come to his office "right now," that he wanted to talk to her. She said that she was not going without union representation.<sup>34</sup> Ziegler said that he was Taylor's boss, demeaned "your Union" in scatological terms, and said that her business agent had left her out to dry. He said that all she did was to cause trouble, and told her to gather up her tools and leave.<sup>35</sup>

Among the machinery in Respondent's shop is a set of machinery which is used in the process of cutting metal to make 5-foot joints of duct, and which is sometimes referred to in the record as the coil line. This set of machinery includes a series of rollers, a floor-level track with a track crane which is used to move pieces of metal onto and off the rollers, and five cradles, each of them about 3 feet in diameter and about 5 feet wide, which are stacked fairly close together. Each of these cradles contains a 10-thousand-pound coil of steel, which is the same size as the cradle and performs the actual cutting. The particular coil to be used in cutting a particular piece of metal while it is on the rollers depends on the gauge of the metal to be cut. The machine operator manipulates the belts that drive the machine, so that the particular piece of metal being processed goes underneath and out of contact with all of the four coils which are not to be used during this particular operation, and comes into contact with only the coil which is appropriate. After being thus cut, the piece of metal remains on and continues to be carried by the rollers until it is either pushed aside, or removed, by other parts of the machinery. The rollers do not operate until the operator presses a button which causes one of the coils to start going around, at which point the rollers, too, start operating. However, the rollers continue to function (inferentially, until the machine operator affirmatively takes action to stop the rollers) after the piece of metal has been cut by the coil, al-

<sup>33</sup> Taylor credibly testified to the belief that Zeller had given her the new tap-collar assignment in order to make her lose track of the rather complicated procedures which her current job required. However, there is no evidence that she told this to Zeller.

<sup>34</sup> See *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975). As previously noted, the Union had given her a steward's course before she became steward.

<sup>35</sup> Except as otherwise indicated, my findings in this paragraph are based almost entirely on Taylor's testimony, which I credit for demeanor reasons. Zeller denied meeting with her that afternoon between their conversation about his alleged participation in the petition and their altercation described *infra*. Ziegler was not specifically asked what, if anything, he told Taylor after the initial tap-collar assignment and before the altercation, but his testimony at least strongly implies that until after this altercation, Zeller did not report her refusal to perform the tap-collar job and Ziegler did not talk to Taylor. Because neither Taylor's diary notes nor her prehearing affidavit states that during the conversation described in this paragraph Ziegler said that if she resigned as steward she could continue to work there as long as Respondent had work, as to this conversation I accept Ziegler's denial of this statement.

though at this point the coil ceases to rotate. One side of the workbench which Taylor was using at this time was separated from the rollers by a 4-foot walkway, and the crane was also resting across from that side of the workbench, but the space between the table on one side, and the rollers and crane on the other side, was otherwise unobstructed. At this time, neither a coil nor the rollers were operating.<sup>36</sup>

Taylor credibly testified that after receiving Ziegler's instructions to gather up her tools and leave, she was not sure whether she had been discharged. She returned to her workbench, positioned herself on a side perpendicular to the coil line, and began to gather up her tools. While she was thus engaged, Zeller brought to an area near her work bench a cart which contained the material to be fabricated into tap-collars, came up to Taylor's work bench, and stationed himself across the bench from Taylor and near a bench corner nearest to the coil line. He said, "Honey, I'm talking louder so you all can hear," and again told her to fabricate the tap collars. Then, using a tune traditionally associated with a nursery rhyme, he softly sang a version of that rhyme which included the names of Taylor and Stiltner and, as so supplemented, implied that they were having an affair (cf. supra Part III D 5). While singing, he used the walkway space which separated the workbench from the coil line and the crane to slowly approach her. When his face reached a point four inches from hers, she screamed an obscenity toward him, screamed that she was "not going to do it," and then pushed him with the upper part of her body. Zeller, who was then about 2 feet from the coil line, took a step or two backward, stumbled over the crane, and then made contact with the rollers, but did not fall to the ground. Zeller credibly testified that he was not injured at all, and there is no evidence otherwise; nor was his clothing damaged. After steadying himself, he started to laugh at her, and walked away. He did not seek any type of medical attention, and missed no work as a result of the incident. At the time of this altercation, Taylor was 44 years old and Zeller was 50. Both of them were of about the same height and weight. Taylor credibly testified that she was offended by his song because she believed he was accusing her of being a prostitute.<sup>37</sup> She and Stiltner both credibly denied dating each other, or having a sexual relationship.<sup>38</sup>

<sup>36</sup> This finding is based on Taylor's testimony. Zeller was not asked about this matter, but his subsequent report to Ziegler about the Zeller-Taylor altercation incident indirectly corroborates her credited testimony (see infra fn. 40). Because the written statements which most of the employee witnesses gave to Zeller about this event shortly thereafter do not state that any equipment was then operating, and for demeanor reasons, I do not credit the contrary testimony of Mitchell, Burns, Castle, or Wilburn (who testified that the rollers were turning although the coils were not).

<sup>37</sup> As noted supra Part III D 5, Zeller had previously accused her of obtaining her job as steward by conducting an affair with Stiltner (a married man who wears a wedding ring) and other union officers. The only economic benefits which Taylor could have obtained from being a steward were protection from layoffs (which did not occur which she was steward) and preference in overtime assignments. She credibly testified that she "wanted to do something for my Union," and felt that being a steward was an honor.

<sup>38</sup> Taylor credibly denied Castle's testimony that she told him that she and Stiltner had gone to a movie and dinner together.

However, the record shows that from time to time, she made remarks in the plant and elsewhere, and engaged in conduct in the plant, of a sex-related nature.

My findings as to the Zeller-Taylor altercation are based on a composite of credible parts of the testimony of the participants and of employees Rodgers, Burns, Castle, Hickenbottom, Mitchell, and Ronald Wilburn, Jr., and also, credible parts of the written employee statements (offered and received into evidence without limitation or objection) received by Zeller after the altercation. In view of the credible testimony that immediately after the altercation, Smith said that he did not see anything, I give no weight to his description of Taylor's nonoral conduct, either in his testimony or in the written statement which he gave to Zeller on the following day. My finding that Zeller walked toward her before she screamed is based on her testimony; Zeller's denial is rejected for demeanor reasons, and several employees who as to this matter testified contrary to Taylor further testified that it was her scream which caused them to look toward her and Zeller. Because of this credited employee testimony about why they started to look at her and Zeller, I further find that Taylor screamed before pushing Zeller, and I do not credit the contrary testimony of Taylor and Burns. My finding that Taylor was in the process of gathering up her tools when Zeller approached her is based on her testimony; I believe it was such conduct which led to Mitchell's erroneous testimony that she had just completed the last item in a work assignment. In crediting (for demeanor reasons) Taylor's testimony about the song over Zeller's denial, I attach no weight to the absence of corroboration of Taylor's testimony, because her credited testimony about the volume of his singing indicates that nobody else was within earshot. The credible evidence shows that Zeller did not use his body in a way which indicated he was going to hit Taylor, and for demeanor reasons I do not credit her testimony that when she screamed she believed she was going to hit her. My findings as to what happened to Zeller's person after he was pushed are based mostly on credible parts of his own testimony and of the testimony of Rodgers, who was 4 or 5 feet away. For demeanor reasons, I do not credit Mitchell's testimony that Zeller fell into two adjacent coils, Castle's testimony that she lowered her right shoulder and directed something in the nature of a football block against Zeller, Castle's further rather uncertain testimony that Zeller did not make contact with anything after being pushed, or Ronald Wilburn, Jr.'s testimony that Taylor twice "lunged" toward Zeller and that he "fell back onto the coils;" Rodgers' credible testimony shows that his clothing was not torn. My finding that Zeller laughed at Taylor after she pushed him is based on her testimony, which I credit for demeanor reasons; Zeller did not squarely deny such testimony, although it is difficult to square with his testimony, which because of his smile I do not credit, that after she pushed him he was "dumbfounded . . . kind of in shock. . . I just walked away, and I had to get my composure."

### 3. Ziegler's initial reaction to the Taylor-Zeller altercation

After this altercation, Zeller proceeded to Ziegler's office.<sup>39</sup> Zeller said that there was "a problem with" Taylor, that she had cursed him, had refused to do a task that he had asked her to do, and had shoved him.<sup>40</sup> During the conversation, Ziegler did not give any indication that Taylor would be fired, nor any indication of what type of discipline, if any, would be given.<sup>41</sup> Then, Zeller went to the shop office and telephoned Stiltner's office; Stiltner was not there, and Zeller left a message asking Stiltner to return Zeller's call. Meanwhile, using the telephone in his own office, Ziegler too, telephoned the union hall and asked to talk to a business agent. No business agents were in the office, and Ziegler left a message asking a business agent to call as soon as possible. After that, Ziegler approached Taylor at her workbench and asked her to come to the shop office, which is used by Gordon. She said that she was not going into that office with Ziegler until a business agent was there (see *supra* fn. 34). Ziegler said that he had called the union hall but nobody was there, and that the Union's secretary was going to try to get hold of somebody. He repeatedly asked her what the problem was, and repeatedly asked her to come into the shop office and discuss it with him. She said that she was not going to put "those collars" together, and that she and Zeller had had "a confrontation." However, she said that she was not going to say anything to Ziegler until she had union representation (see *supra* fn. 34). Ziegler testified that during this conversation, Taylor was "very upset," that she was "very belligerent," that her voice was at a "high pitch," and that she "wasn't going to listen to anything that I had to say... she... refused to do anything to calm herself down or to talk to me in any way." He said that he would wait until the business agent arrived before asking her further questions, and again told her to pack up her tools and go home for the day.<sup>42</sup> Taylor credibly testified that she gathered up her tools, went out to a picnic table in front of the plant, and waited for Stiltner to show up.

Meanwhile, Stiltner's office paged him; told him that Zeller, Ziegler, and Taylor had all called him at his office; and further told him that there was a problem at Respondent's facility.

<sup>39</sup> This finding is based on Zeller's testimony, in effect corroborated by Ziegler. I believe Castle was mistaken in testifying that Zeller proceeded to the shop office.

<sup>40</sup> This finding is based on a composite of credible parts of Zeller's and Ziegler's testimony. Ziegler testified that Zeller said Taylor had pushed him into a piece of equipment. However, Zeller did not testify that he told Ziegler that Taylor had pushed him into a piece of equipment, nor did Ziegler's prehearing affidavit so state. Because any contact by Zeller with the coil line while it was moving would have been very dangerous to him, the absence of any evidence that Zeller told Ziegler that the machinery into which Taylor had pushed him was then moving indirectly corroborates Taylor's credible testimony that the machinery was not moving.

<sup>41</sup> This finding is based on Zeller's uncontradicted testimony.

<sup>42</sup> My findings as to this conversation are based on Ziegler's testimony. Because employees Mitchell and Ronald Wilburn Jr., credibly testified to having seen Ziegler and Taylor conversing outside the shop office after her altercation with Zeller, I do not accept Taylor's denial, in effect, that she had a conversation with Ziegler after her altercation with Zeller and before Stiltner arrived at the plant later that same day (see *infra*).

Stiltner thereupon telephoned union business agent Biggs and asked him to meet Stiltner there.

When Stiltner arrived at the facility, he found Taylor sitting at the picnic table and sobbing. Stiltner asked her what had happened. Stiltner credibly testified that she said Zeller had told her to make a tap-collar; he had "gotten in her face;" and she had "shoved" or "pushed" him "out of her face." Inferentially, she also said that Zeller had accused her of having sexual relations with Stiltner (see *infra* fn. 46). She said that Ziegler had told her to go home. While she was relating this to Stiltner, and was still weeping, Biggs arrived. Stiltner asked whether she had "been fired or was supposed to go back to work." She said that she was not sure. As Taylor was about to leave for her home, Ziegler came out of the building. Stiltner asked Ziegler whether or not Taylor had been fired. Ziegler said no, that he had not fired her, that she was emotional and crying, this was making her production go down, and he wanted her to take the rest of the day off, go home, and come back the next day. Stiltner asked Ziegler what had been going on; Ziegler testified that he "told [Stiltner] as little as I knew about it, because I did not witness the altercation." Stiltner asked who was involved in it; Ziegler replied that other than Zeller and Taylor, Ziegler had no idea. Stiltner said that he would like to talk to the people. He asked Ziegler to send out Zeller so Stiltner could get his side of the story, and also to send out with him any witnesses at all who might have seen or heard what had happened. Ziegler asked the union representatives where they wanted to talk; they proposed the picnic table.

### 4. The February 18 picnic table discussion of the Taylor-Zeller altercation

At this point, Ziegler reentered the building, told Zeller that Stiltner and Biggs were out at the picnic table, said that Zeller "probably ought to go out and explain what was going on," but did not tell him to take any witnesses with him.<sup>43</sup> Then, Ziegler briefly went outside and asked Stiltner to come to Ziegler's office after completing his investigation, to tell Ziegler the results; Ziegler testified that he made this request because he wanted to know whether the Union was going to take any disciplinary action against Taylor. On the way out, Zeller approached employee Jerry Smith, who was the first person Zeller had seen after the altercation, and asked whether Smith had seen what had happened. When Smith said yes, Zeller asked him to accompany Zeller as a witness. Only Zeller and Smith came to the picnic table.<sup>44</sup> Stiltner asked Zeller what had happened. Zeller said that Taylor had pushed Zeller, or that she had run into him with her chest.<sup>45</sup>

<sup>43</sup> My findings as to Ziegler's remarks to Zeller are based on Zeller's testimony, which I credit for demeanor reasons and the reasons summarized *infra* fn. 44.

<sup>44</sup> Zeller testified that at that time, he knew of no other witnesses to the altercation; "I was still in shock." However, his action in bringing out only Smith, without then making any effort (so far as the record shows) to find any other witnesses, tends to confirm Zeller's credited version of Ziegler's instructions, and tends to reflect on Ziegler's discredited testimony that he told Zeller to bring to the picnic bench "whoever witnessed" the altercation.

<sup>45</sup> This finding is based on the testimony of Biggs, the only witness who gave specific testimony about what Zeller said.

Stiltner asked Zeller whether he had at any time made any "lewd" remarks in front of anyone else about Taylor and Stiltner. Zeller asked what the word "lewd" meant. Biggs said that "lewd" meant licentious, crude remarks of a sexual connotation. Then, Stiltner asked Zeller whether he had made lewd remarks about Taylor and Stiltner. Zeller said yes, and dropped his head.<sup>46</sup>

Then, Stiltner asked Smith what he had seen. Smith said that he heard Zeller and Taylor shouting at each other, but that he had been too far away to see anything.<sup>47</sup> In response to further questioning by Taylor, Smith said that he had not heard Zeller say anything.

At this point, Taylor went home. In accordance with Ziegler's request (before Stiltner proceeded to the picnic table) that Stiltner return to Ziegler's office after concluding his "investigation" with respect to the altercation, Stiltner then went to Ziegler's office, leaving Biggs at the picnic table.<sup>48</sup> Ziegler asked Stiltner what he was going to do to solve the problem. Stiltner asked what Ziegler meant by that. Ziegler asked whether Stiltner was going to remove Taylor as a steward. Stiltner said, not at this time, that he needed more time to gather his information and to think the matter over. Ziegler said that Stiltner could solve "everybody's problem" by removing Taylor as steward, and told him to "think about that overnight." Stiltner asked if he could come in the next day at lunchtime to talk to the employees. Ziegler asked him to come in a half hour before lunchtime, so the employees would not miss their lunch, to talk to the employees. The conference then broke up.

Biggs never called any of the union members working at Respondent's shop to determine who else had witnessed the altercation. So far as the record shows, Stiltner made no such calls

<sup>46</sup> My findings in this paragraph are based on a composite of credible parts of the testimony of Biggs, Stiltner, and Zeller. Taylor was not asked about this part of the conversation. Because of Stiltner's and Biggs' credible testimony that Stiltner directed such an inquiry to Zeller, I infer that Taylor had related to them at least some of Zeller's accusations to her about an affair with Stiltner. Zeller testified that Stiltner asked whether Zeller had ever made any lewd remarks "towards" or "to" Stiltner, and that Zeller said no. Because it seems unlikely that Stiltner would ask such a question in the context of Taylor's claim that prior to the altercation Zeller made at least arguably lewd remarks to her, and for demeanor reasons, I credit Stiltner's and Biggs' version (summarized in the text) of Stiltner's question, and do not credit Zeller's denial that he admitted making, or in fact made, any kind of lewd, lascivious, or sexual remarks about Stiltner and Taylor. Because inconsistent with the testimony of Zeller (as well as Stiltner and Biggs), Smith's testimony that there was no discussion of Zeller's making inappropriate remarks regarding Taylor and Stiltner is likewise discredited.

<sup>47</sup> This finding is based on Biggs' testimony, substantially corroborated by Taylor and Stiltner. For demeanor reasons and the other reasons summarized supra Part III E 2, I do not credit Smith's testimony that he said he heard Taylor direct an obscenity toward Zeller and had seen her attack him. Also for demeanor reasons, I do not credit Zeller's testimony that Smith's statement was limited to an affirmative reply to Stiltner's question as to whether Zeller's account was true.

<sup>48</sup> My finding that Biggs did not accompany Stiltner is based on Stiltner's testimony. I believe Ziegler was mistaken in testifying that both union representatives came to his office.

between the time this conference broke up and 11 a.m. the following day, February 19, when he returned to the shop. Meanwhile, Taylor clocked in on February 19, at 7 a.m., her usual hour, and started to work as usual.

#### 5. Rudowski's February 19 proposal that the Union replace Taylor as steward

In the morning of February 19, Rudowski telephoned Frazier at his Dayton, Ohio, office. Rudowski said that there was a problem with the union steward at Respondent's facility; that if Frazier did not intercede and replace her, she was going to be fired; but that if Frazier did, she would not be fired. Frazier said that he had a hard time interfering with any of the business agents, that he had to have more information, and that at that point, he was not going to intercede and remove Taylor.<sup>49</sup>

#### 6. The February 19 shop meeting

Zeller testified that just before the end of the day on February 18, he learned that there were witnesses to the altercation other than Smith. On February 19, before Stiltner began the shop meeting, Zeller asked all of the shop employees to write down anything that they had seen of the altercation. Zeller eventually received such handwritten statements from at least 5 employees (Mitchell, Burns, Smith, Rodgers, and Ronald Wilburn Jr.). Mitchell, Burns, and (perhaps) Wilburn gave Zeller their handwritten statements before the shop meeting conducted by Stiltner on February 19.

Stiltner returned to Respondent's facility at about 11 a.m. on February 19, and addressed a meeting of all the shop personnel (including statutory Supervisors Gordon and Zeller) while they were on the clock. Stiltner passed out copies of the collective-bargaining agreement, made some remarks about what a steward's duties were, and asked what problems the employees had been having in connection with Taylor as steward. Shop foreman Gordon asked whether Stiltner was going to remove Taylor as a shop steward. Stiltner said no, not at this time. Gordon immediately left the area.<sup>50</sup> After apprentice Burns questioned Stiltner's announced decision to keep Taylor as steward, Burns and Stiltner engaged in what was likely an acrimonious discussion of the matter; several weeks later, the local Joint Apprenticeship Committee issued Burns a warning in connection with this exchange (see *infra* part III F).<sup>51</sup> Stiltner credibly testified to asking that any employees who had heard or seen the Zeller-

<sup>49</sup> My findings in this paragraph are based on Frazier's testimony. For the reasons summarized supra fns. 21 and 26 and for demeanor reasons, I do not credit Rudowski's denial that he made such a remark to Frazier. Rudowski did not deny conversing with Frazier and Ziegler that morning about Taylor. A memorandum prepared by Ziegler after Taylor's discharge, for his own internal files, which was offered into evidence for purposes of impeachment by omission and whose receipt was opposed by Respondent on relevance grounds, states that on the same day as but after Ziegler's February 18 conference with Stiltner, Ziegler telephoned Rudowski and Frazier.

<sup>50</sup> My findings as to this Stiltner-Gordon exchange are based on credible parts of the testimony of Stiltner and Taylor. In view of Gordon's subsequent conduct (see *infra*), and for demeanor reasons, I do not believe Gordon's rather uncertain denial or Wilburn's denial.

<sup>51</sup> I need not and do not make any findings as to the details of this exchange.

Taylor altercation provide their information about it to Stiltner.<sup>52</sup> Zeller did not give Stiltner, at this or any other time, the written employee statements which Zeller had received either before or after the shop meeting.<sup>53</sup>

7. Ziegler's February 19 request for Taylor's replacement as steward

Ziegler testified that on February 19, a decision of Stiltner to remove Taylor as steward would have been important to Ziegler. Before the shop meeting began, Ziegler had told Gordon that if Stiltner did not appoint another steward, Gordon was to tell him to go to Ziegler's office after the meeting.<sup>54</sup> A few minutes after being advised that Taylor would remain as steward and thereupon leaving the meeting, Gordon returned and said that Ziegler wanted Taylor and Stiltner to come to Ziegler's office after the shop meeting had ended; Stiltner agreed to do this. After the meeting had ended, Gordon sent Stiltner to talk to Ziegler; Gordon testified that he took this action because Stiltner had not removed Taylor as steward.

<sup>52</sup> To the extent inconsistent with such testimony, I do not credit the testimony of Rodgers, Mitchell, Burns, or Hickenbottom that Stiltner did not ask any employees present if they had observed what had happened during the Zeller-Taylor altercation.

<sup>53</sup> The employee statements which Zeller received or may have received before the meeting alleged that Taylor had pushed or shoved Zeller and had yelled obscenities at him. None of them alleged that she had pushed him into any equipment.

<sup>54</sup> This finding is based on testimony given by Gordon on cross-examination, and without objection, after his memory had been refreshed by such statements in his April 1997 affidavit. Respondent's counsel elected not to ask Gordon any questions on redirect. Ziegler, who testified for Respondent before Gordon did, was asked by union counsel on cross-examination (without objection) whether Ziegler had asked Gordon to report to him the results of Stiltner's February 19 shop meeting, to which Ziegler replied no. Still on cross-examination by union counsel, Ziegler was asked (without objection) whether he had any conversation at all with Gordon about the February 19 meeting, to which Ziegler replied, "I don't believe so, no." Still later on cross-examination, when asked (without objection) whether at any time on February 18, or the morning of February 19, he had asked Gordon to let him know if Stiltner decided to remove Taylor as steward, Ziegler replied that he did not recall one way or the other. Respondent's counsel did not at that time choose to ask Ziegler any questions about this matter on redirect. However, on the day after Gordon testified, and before resting, Respondent's counsel recalled Ziegler (over objection by opposing counsel) and asked him whether, prior to the February 19 shop meeting, he had told Gordon that if Stiltner did not appoint another steward, Ziegler wanted to see Stiltner. Opposing counsel objected to this question on the ground that union counsel had already asked Ziegler that question on cross-examination and that Respondent's counsel had not then asked him any questions on redirect. I sustained the objection, but permitted Respondent's counsel to make a proffer in question and answer form; Ziegler answered that question in the negative. Because I perceive no reason for Gordon to misrepresent this matter, because Gordon's testimony in this respect is indirectly corroborated by his conduct in asking Stiltner and Taylor to go to Ziegler's office after the shop meeting had ended, and for demeanor reasons, as to this matter I credit Gordon.

Accompanied by Taylor, Stiltner thereupon went to the doorway of Ziegler's office, which was very small.<sup>55</sup>

Ziegler asked Stiltner what he was going to do. Stiltner asked, "... do about what?" Ziegler said, about Taylor's being a steward. Stiltner said that he had not yet finished collecting information about what had happened the previous day. Ziegler told Taylor that if she resigned as steward, or Stiltner removed her as steward, she would have a job with Respondent as long as Respondent had work. Then, Ziegler again asked Stiltner whether he was going to remove Taylor as steward. Stiltner said no. Ziegler thereupon became very irritated, smacked his desk, said that "this is totally unacceptable" and told Taylor that if he fired her, she should not blame him, but instead should blame Stiltner. Stiltner said that if Ziegler fired her, it would be Ziegler's fault. However, Ziegler did not otherwise say that she was going to be fired, or say anything about her having shoved Zeller. Ziegler testified that he told Taylor to blame Stiltner if she was fired because "I felt that. . . when I gave the Union business representative the evening to confer with his boss, to come back in and confer with the employees, that the Union would take some disciplinary action, whether they were allowed to or not. . . so that we could defuse the problems in our shop . . . I was accommodating the Union because they asked me to." Ziegler concluded the conversation by telling Taylor to go back to work and Stiltner to leave, and saying that as Respondent's management, Ziegler "had to do something about it" and would take "the appropriate action."<sup>56</sup>

8. Taylor's February 19 pink slip

After this conversation, which took place around noon, Stiltner left the plant, and Taylor went back to work. At about 2:30 p.m., Zeller approached Taylor, leaned over her worktable, and repeated the nursery-rhyme song, alleging that she and Stiltner had been having an affair, which he had sung to her earlier that day.<sup>57</sup> Then, he said, "... by the way, for the rest of the day, go over and insulate, will you?" She got her insulating tools together and went to the insulation tables. At 3:10 p.m., 20 minutes before quitting time, Ziegler approached Taylor on the shop floor, and gave her two paychecks and a pink termination slip stating that she had been discharged, effective at 3:10 p.m. on February 19, for "Insubordination (Shoving fellow worker)."<sup>58</sup> Before she received this termination slip, nobody had ever told her, on Respondent's behalf, that she was being terminated for being insubordinate or for pushing a supervisor. Respondent's work rules include the following (emphasis in original): "Violation of any of these rules is cause for discipli-

<sup>55</sup> Stiltner testified that they did not enter Ziegler's office because Stiltner had been invited out of Ziegler's office in the past and had never been invited back in.

<sup>56</sup> My findings as to this conversation are based on a composite of credible parts of the testimony of Taylor, Stiltner, and Ziegler. For demeanor reasons, and the reasons summarized infra Part III G1, I do not credit Ziegler's testimony that he did not say that if Taylor resigned as steward she would continue to have a job with Respondent.

<sup>57</sup> My finding as to the song is based on Taylor's testimony. For demeanor reasons, I do not credit Zeller's denial.

<sup>58</sup> Ziegler inaccurately testified that this slip stated she had been terminated for "insubordination, refusing to do a project, cursing at a fellow employee, and doing physical contact with another employee."

nary action, up to and including possible discharge, even on the first violation. . . HORSEPLAY causes accidents and is strictly prohibited." Taylor admittedly knew that Respondent prohibited horseplay. Nobody at the Columbus shop had been disciplined or discharged for any reason during the 2-year period preceding Taylor's termination.

Ziegler never obtained Taylor's version of the February 18 altercation. After her exercise (immediately thereafter) of her statutory right to refuse to tell him about it until she had union representation, Ziegler never again asked her to give her version, either upon Stiltner's arrival at the plant a half-hour or so later or at any other time. Ziegler testified that when he found out about the February 18 altercation immediately after it occurred, "I had more or less, made up my mind that it was a safety issue, and that if the Union didn't do something, Ms. Taylor was going to be fired for insubordination, cursing at another employee, and physically attacking him." Ziegler admitted, however, that profanity by Respondent's employees is not unusual; and, as previously noted, her termination slip said nothing about cursing. When asked on direct examination what Ziegler expected the Union to do about the Taylor "problem," he testified that the Union had "the right to remove Rosemary Taylor from our employment if they wanted to. I didn't know that they wanted to. I didn't know that they would do that, but I felt that they should take some kind of disciplinary action." When asked on cross-examination what he thought Stiltner was going to do after completing his investigation, Ziegler testified that he did not think Stiltner would take her away from her employment, that Ziegler did not know whether the Union had a right to terminate Respondent's employees, that during his 35 years as sheet metal trade manager the Union had never disciplined one of Respondent's employees by taking him off the job (but Respondent "never had any problems with anybody on the job before like this"), and that Ziegler did not know whether he would have accepted something from the Union short of termination. As to why he did not terminate Taylor "on the spot" upon learning about the altercation, Ziegler testified that Stiltner had asked Ziegler "if [Stiltner] could have the night to sort things out and come in the next day and talk to the employees. I think [Stiltner deserved] that much time to make [his] decision."<sup>59</sup> Ziegler testified, however, that he did not know whether Stiltner planned to use the interval "to investigate, or what." During the approximately 4 hours between receiving Stiltner's February 19 statement that Taylor would not be removed as steward and Ziegler's action in discharging Taylor, Ziegler telephoned counsel and then arranged with the payroll department to prepare Taylor's pink discharge notice and final paychecks. Ziegler's April 1, 1997 prehearing affidavit states that after Stiltner's February 19 shop meeting, he said that at that time they were taking no action and that Taylor would stay here. (The Union can replace employees from one jobsite). I did not expect the Union to remove Taylor from working for the Employer. I did, however, expect that the Un-

<sup>59</sup> Ziegler was not asked why he reacted to Zeller's report of the incident by asking the Union to have a business agent call, and then, in effect, waiting to hear from him.

ion would take some discipline against Taylor for the way she acted and the safety violation it caused.

On February 24 or 25, Zeller gave the 5 handwritten employee statements about the altercation to Ziegler, who arranged to have them typed.<sup>60</sup> Then, Ziegler gave Zeller typewritten copies of these statements, and probably, the originals as well. At Zeller's request, each employee signed his or her typewritten statement before a member of management who was a notary public.

#### 9. Steward activity at Respondent's facility

Ziegler testified at one point that the Taylor matter was the first time in his 35 years of employment with Respondent (the last 20 as sheet metal trade manager) that a steward had complained to him about anything. He went on to testify that this was one of the reasons he wanted Zeller (Taylor's predecessor) to remain as steward. At another point, Ziegler testified that Zeller and his predecessors as steward brought various complaints or problems, including safety matters, to Ziegler's attention. Zeller testified that when he was steward, he never filed any grievances, nor raised any safety complaints. Ziegler testified that when Taylor was steward, she never spoke with him about any safety problems in the shop; but he went on to testify that there were no safety problems when she was steward. Ziegler further testified that when Taylor was a steward, she brought personal complaints to Ziegler, but never brought any complaints on behalf of other employees, nor filed any complaints or grievances alleging that Respondent was violating the bargaining agreement. In addition, he testified that other than the grievance with respect to Taylor's discharge, the Union had never filed any "grievances" as to his decisions as sheet metal trade manager; his testimony indicates that he was referring to written "grievances" (see *infra* fn. 65).

#### F. Aftermath

Neither union member Zeller, Stiltner, nor (so far as the record shows) anyone else filed any intraunion charges against Taylor. After Taylor's discharge, Stiltner filed intraunion charges against Zeller. On April 4, 1997, after a trial, Zeller was fined \$1500 (about 3 weeks' take-home pay), with \$1200 suspended but "payable if reoccurrence of charges happens within one year."<sup>61</sup>

<sup>60</sup> My finding as to the date that Ziegler received these handwritten statements is based on his testimony. I believe Zeller was mistaken in his testimony that he gave at least some of them to Ziegler at about 2 p.m. on February 19. Zeller was not asked when he gave Ziegler the handwritten statement or statements which Zeller received after February 19. In any event, Ziegler testified that his decision to discharge Taylor was reached before he received any of these employee statements.

<sup>61</sup> Zeller was found guilty of violating provisions of Article 17 of the constitution of the Union's parent International, which forbid conduct that interferes with, diminishes, or destroys a member's ability to perform his union office (Section 1(a)); violation of union rules or bargaining agreements (Section 1(e)); and conduct that is detrimental to the Union's best interests or brings it into disrepute (Section 1(m)). It is unclear from the record what conduct by Zeller was found to breach these provisions.

On an undisclosed date after February 19, Stiltner filed against Mitchell intraunion charges which alleged that he violated Article 17, Sections 1(c) and 1(m) of the International constitution (see *supra* fn. 61) by

conduct[ing] a survey of [union] members. . . in an effort to have shop steward Rose Taylor removed and replaced. This was done without my knowledge. This action did diminish, interfere with and/or possibly destroy my ability as Business Agent to discharge my duties. Mitchell's action in this matter influenced a problem that did result in the Shop Steward being discharged by [Respondent] and [the Union] filing a grievance.

On April 4, 1997, after a hearing on these charges, the union trial committee found Mitchell to be "Not Guilty."

On an undisclosed date after Taylor's discharge, Stiltner filed internal union charges alleging that during Stiltner's February 19 shop meeting, Burns violated Article 17, Sections 1(c) and (m) of the International Constitution (see *supra* fn. 61) by "act[ing] in a very disrespectful manner, raising [his] voice and person in a threatening manner" to Stiltner.<sup>62</sup> After a hearing with respect to his conduct at the February 19 shop meeting, Burns received a verbal warning to watch what he was doing, not to do anything like that again.<sup>63</sup>

On March 18, 1997, Taylor filed with the Ohio Bureau of Employment Services a "Request for Reconsideration" of its action in denying her unemployment compensation. Her appeal alleged that she had been fired because she was the union steward and not because she shoved an employee. The request was denied on April 4, 1997, on the ground, in part, ". . . the incident did take place on company time, on company property. [Taylor] violated employer's known policy." On April 14, 1997, Taylor filed a charge (which was eventually dismissed) with the United States Equal Employment Opportunity Commission, alleging, *inter alia*, "I believe that the fact that I was a female serving in the steward position and having replaced another man in that capacity was the basis for" her dismissal. Both of these charges alleged that Zeller had repeatedly implied that she and Stiltner had been having an affair, but did not otherwise allege that Zeller had directed any singing toward her.

The bargaining agreement which was in effect when Taylor was discharged in February 1997, expired by its terms at the end of May 1997. In preparation for negotiations as to a succeeding agreement, the members of the Association discussed with its executive vice president, Rudowski, what proposals to submit to the Union. During these discussions, one or two of the Association's members, but not Respondent, expressed concern about the provision in the expiring contract calling for the steward's being the next to last employee to be laid off. Contractual changes to reflect these concerns were suggested

by the Association's representatives (who were headed by Rudowski but did not include any members of Respondent's management, so far as the record shows) to the Union during contract negotiations. However, Rudowski did not recall that any changes in such provisions were included in the Association's formal proposal to the Union, and the June 1997-May 2000 contract, executed on June 1, 1997, contained as to the layoff of stewards the same provision as the immediately preceding contract.

At the time of the February 1999 hearing, the steward in Respondent's shop was journeyman Brian Withrow. He was capable of performing most of the jobs in the shop, but in December 1996, Gordon had made adverse comments to Ziegler about Withrow's attendance, as well as Taylor's. Between the week ending March 26, 1996, and the week ending July 30, 1996 (the most recent period covered by the payroll records, some of which are incomplete, in evidence), Taylor's name appears on 19 weekly payrolls, and Withrow's name appears on 17 weekly payrolls. During this period, Taylor worked less than 40 hours during 13 weeks, including 5 weeks when she worked less than 32 hours. Withrow worked less than 40 hours during 11 weeks, including 3 weeks when he worked less than 32 hours. During undisclosed periods between Taylor's February 1997 discharge and the February 1999 hearing, employees Hickenbottom and Rodgers served as temporary stewards. During the March 1996-July 1996 period specified above, Rodgers' name appears on 14 weekly payrolls; she worked less than 40 hours during 8 weeks, including 6 weeks when she worked less than 32 hours. During this same period, Hickenbottom's name appears on 17 weekly payrolls; he worked less than 40 hours during 3 weeks, including 1 week when he worked 31 hours. During this same period, Zeller's name appears on 18 weekly payrolls; he worked less than 40 hours during 4 weeks, including 2 weeks when he worked less than 32 hours.

### G. Analysis and Conclusions

#### 1. The independent 8(a)(1) allegations

The credited evidence shows that immediately after the February 19 shop meeting, sheet metal trade manager Ziegler told employee Taylor that if she resigned as steward, or if union business representative Stiltner removed her as steward, she would have a job with Respondent as long as Respondent had work; but after Stiltner stated that he was not removing Taylor as steward, Ziegler told her that if he fired her, she should blame union business representative Stiltner and not Ziegler. Holding union office clearly falls within the activities protected by Section 7 of the Act. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 703 (1983). Accordingly, I find that Respondent violated Section 8(a)(1) when sheet metal trade manager Ziegler, an admitted supervisor, threatened Taylor with discharge if she retained her position as union steward. *J.T. Slocomb Co.*, 314 NLRB 231 (1994); *Aero Metal Forms*, 310 NLRB 397, 399-400 (1993).

In discrediting Ziegler's denial that he made this and other similar statements, I rely not only on his demeanor, but on various inconsistencies and evasions in his other testimony. Thus, Ziegler's prehearing affidavit that he was "dismayed" at Tay-

<sup>62</sup> Stiltner initially filed such charges with the International. However, upon learning that Burns was a first-year apprentice and not an apprentice member, Stiltner withdrew the charges with the International and filed identical charges with the local Joint Apprenticeship Committee.

<sup>63</sup> This finding is based on Stiltner's and Burns' testimony. I believe employee Mitchell was mistaken in testifying that Burns was "completely exonerated." Cf. *supra* fn. 62.

lor's appointment as steward is inconsistent with his testimony that he had no desire that she be removed as steward (see supra fn. 9 and attached text). Moreover, in attempting to explain why he did not announce his decision to discharge Taylor until about 24 hours after the altercation with Zeller which allegedly motivated Ziegler's discharge decision, Ziegler variously testified (1) that the Union had a right to remove Taylor from Respondent's employ if the Union wanted to; (2) that he did not know whether the Union had a right to terminate Respondent's employees; (3) that he did not know whether he would have accepted something from the Union short of termination; (4) that he did not know whether the Union wanted to or would remove her from employment, but he felt that the Union should take some disciplinary action; and (5) that if the Union did not "do something," Taylor was going to be fired for insubordination, cursing at another employee, and physically attacking him. Moreover, Ziegler's prehearing affidavit stated that he did not expect the Union to remove Taylor from working for Respondent. Furthermore, as previously noted, he testified at one point that no steward had complained to him about anything before Taylor became steward, and at another point that her predecessors as steward had brought various complaints or problems to his attention. The facial unreliability of his testimony in these respects casts doubt on his veracity generally.

## 2. Taylor's discharge

The credited evidence leaves no room for doubt that Ziegler's decision to discharge Taylor was motivated, at least in part, by her and union business representative Stiltner's refusal to relinquish her status as steward. Thus, immediately after the February 19 shop meeting ended at about noon, and less than 4 hours before Taylor received her termination papers, Ziegler told her and Stiltner that if she resigned as steward, or Stiltner removed her as steward, she would have a job with Respondent as long as Respondent had work. When Stiltner thereupon said that he was not removing Taylor as steward, Ziegler said that if he fired her, she should not blame him, but instead should blame Stiltner. The day after she became steward, when Taylor told Ziegler that Stiltner had said he would appoint someone else as steward (which he never in fact did), Ziegler told her that he could not promise her a job forever, but that she would have a job as long as he had work. When first advised that Stiltner intended to name Taylor as steward, Ziegler said that Stiltner could appoint anyone but Taylor to act as steward, and obscenely stated that if he did appoint her, he could take her with him and leave "right now." Finally, on the following day, after foreman Gordon (who favored an employee other than Taylor as steward) had transferred her to a new job as "layout person" which she had not performed since she was an apprentice, she had been denied the assistance from other employees which was ordinarily offered, and Gordon thereafter gave her a job assignment which he knew that for medical reasons she could not do, Ziegler told her that Stiltner was not going to tell him who "my steward" was going to be, that if she did not resign as steward she would get more of the same, that she never would have been asked to do the layout job if she had not been appointed a steward, that he would send her out to the field (thereby effecting her disqualification as shop steward) in order

to get rid of her, and that he was going to write Stiltner a letter rejecting her as "his [i.e., Ziegler's] Union steward." On the following day, after her action in signing for the union labels had precluded Respondent from transferring her to the field, Ziegler told her that she had "screwed up" by signing for the labels and "now it's war." Then, Gordon and Ziegler told her to resign as steward, and Gordon told her to tell Stiltner to retrieve his labels.

As previously noted, holding the office of union steward falls within the activities protected by Section 7 of the Act. *Metropolitan Edison Co.*, supra, 460 U.S. at 703; *Lectromelt Casting & Machinery Co.*, *Eagle Picher Industries*, 278 NLRB 696 (1986), enf. 831 F.2d 295 (6th Cir. 1987). Moreover, the grievance procedure is an integral part of the collective-bargaining process contemplated by the Act, the activities of a union steward in connection with the grievance procedure are an essential part of its function, and the entire process of collective bargaining is structured and regulated on the assumption that the parties proceed from contrary and to an extent antagonistic viewpoints and concepts of self-interest. For these reasons, the statute forbids coercion of union representatives (including union stewards), as well as of management representatives, in the performance of their official duties. *Metropolitan Edison*, supra, 460 U.S. at 704; *Aeronautical Lodge v. Campbell*, 337 U.S. 521, 527-528 (1949); *Dairy Lea Cooperative*, 219 NLRB 656, 658-659 (1975), enf. 531 F.2d 1162 (2d Cir. 1976); *Consumers Power Co.*, 245 NLRB 183, 187 (1979). Accordingly, an employer's unilaterally imposed restrictions on the bargaining representative's choice of the employee to act as steward are unlawful in the absence of compelling justification based on legitimate considerations.<sup>64</sup> I reject Respondent's seeming contention that the reasons which it has advanced for objecting to Taylor as steward constitute compelling justification based on legitimate considerations.

In the first place, Ziegler testified that one of the reasons he wanted Zeller to remain as steward was that he had never complained to Ziegler about anything; indeed, Ziegler testified at one point that Taylor's complaints about her treatment by Respondent's management were the first complaint he had received from a steward in his 35 years (the last 20 as sheet metal trade manager) of employment with Respondent.<sup>65</sup> However, such a basis for objecting to the Union's selection of a new steward goes to the very heart of the Union's statutory right to change stewards<sup>66</sup> and, moreover, calls into question the complete honesty of other reasons advanced by management for their objection to Taylor as steward.

The evidence, likewise, reflects on the sincerity (and, therefore, any weight to which such a contention might otherwise be

<sup>64</sup> *Allis-Chalmers Corp.*, 231 NLRB 1207, 1212-1213 (1977); *Dravo Corp.*, 228 NLRB 872, 874 (1977).

<sup>65</sup> What the bargaining agreement denominates as union "grievances" are filed by the business representative. At least ordinarily, such "grievances" are preceded by oral complaints made to management by the steward. If the steward is dissatisfied with management's response, he or she brings such "problems" to the attention of the business representative, who files a written "grievance" if he believes such action is appropriate.

<sup>66</sup> See *Pittsburgh Press Co.*, 234 NLRB 408 (1978).

entitled) of Respondent's contention that it objected to Taylor's being a steward because she had been selected as such by the Union's business representative (who had been elected by the Union's members) and not by Respondent's shop personnel. Taylor's predecessor as shop steward, Zeller, had likewise been selected by the Union's then business representative, whose mandate from the employees obviously predated Stiltner's, but far from raising any objection to Zeller because of the manner of his selection, Respondent was admittedly anxious to retain him as steward. Indeed, the then current bargaining agreement (as well as its successor) in terms empowers the Union's business manager or business representative to select as a steward whomever they deem necessary. In any event, the means by which the bargaining representative selects and decides whether or not to retain its stewards (and other officers and representatives) is a matter to be determined by the union and not the employer.<sup>67</sup>

Likewise suspect as to sincerity is Respondent's contention that it did not want Taylor as steward because it anticipated that her imperfect attendance record, although admittedly insufficient to call for her discharge so long as she was not a steward, would compromise her ability to serve as steward. However, when the Association was preparing for negotiations with the Union for a bargaining agreement to succeed the agreement in effect when she was discharged, Respondent made no effort whatever to include in the new agreement any provisions with regard to stewards' attendance. Furthermore, because Respondent's reliance on her possible unavailability to affix union labels to Respondent's products (there is no evidence that her absences ever caused even delays in affixing union labels) is based on a matter which is neither covered by the bargaining agreement, nor a mandatory subject of collective bargaining,<sup>68</sup> such a consideration adds virtually nothing to any contention of "compelling justification;" to the extent (as suggested by Ziegler's testimony) that her absences may have interfered with her ability to represent unit employees, any such alleged problems would be a legitimate concern of the Union and not of the Respondent.

Finally, Respondent relies on the fact that although Zeller (and Withrow, who became steward after Taylor's discharge) were able to perform most of the jobs in the shop, Taylor did not know how to perform a number of them. Pointing to the provision in the bargaining agreement that the steward is to be the next to last shop employee subject to economic layoff, Respondent relies on the potential damage to it in the event of an economic layoff which could reduce the work complement to two employees one of whom (the steward) could not perform the work then in the shop. (So far as the record shows, at no time after Taylor became steward was the shop work force diminished to as few as two employees). However, although after she became steward Respondent's management assigned her jobs to which she had never been assigned before, there is no evidence that management ever initiated a systematic and

conscious effort to teach her how to perform all or most of the jobs which as a nonsteward she had been unfamiliar with, or even how to perform the unfamiliar jobs to which she was in fact assigned after becoming steward. Moreover, when Respondent raised the issue of her limited flexibility, the Union thereupon said that "we would discuss it" if it ever got down to the point where Respondent had low employment and there were jobs which she could not do—in short, that if need be, Respondent's concerns would be accommodated. That such an assurance was to be taken seriously is indicated by the parties' long-term bargaining relationship and by the fact that the bargaining agreement already provided in terms that a laid-off steward is to be the first to be recalled from layoff "providing [the steward] is qualified to perform" the job, and that the steward is to be asked to work overtime when overtime work is to be done, "on any job for which [the steward] is qualified to perform the work." Nonetheless, Respondent made no effort to achieve an accommodation between, on the one hand, its own perceived interests in retaining a broadly skilled employee in the event of layoff and assuring the prompt attachment of union labels and, on the other hand, the Union's statutory right to select its own representatives.<sup>69</sup> Indeed, even when the Association was preparing to negotiate a new bargaining agreement with the Union after Taylor's discharge, Respondent made no effort at all to induce the Association to seek modification of the layoff restrictions which had been included in the expiring contract, and as to this matter the successor contract to which the Association agreed on Respondent's behalf was identical to the one in effect when Taylor was discharged.<sup>70</sup> In the absence of efforts to achieve such an accommodation, Respondent could not lawfully discharge Taylor because she was a steward whose perceived deficiencies as an employee, although not rendering her unacceptable as such, were apprehended to inconvenience Respondent if she remained as steward; see *Northeast Constructors, Division of Cives Corp.*, 198 NLRB 846 (1972). In the event, Respondent's conduct in discharging her had the effect of depriving the Union of her services as steward during a period when her employment skills were sufficiently broad for Respondent's needs and (so far as the record shows) union labels were promptly affixed to Respondent's products.

For the foregoing reasons, I conclude that the evidence preponderantly shows that Respondent discharged Taylor for reasons, at least in part, which would render her discharge violative of the Act if they were the sole motivation. Accordingly, her discharge violated the Act unless Respondent demonstrates, by a preponderance of the evidence, that she would have been discharged for lawful reasons even if she had not engaged in

<sup>67</sup> *Missouri Portland Cement Co.*, 284 NLRB 432 (1987); *Torrington Industries*, 307 NLRB 809, 812, 818 (1992).

<sup>68</sup> *Electrical Workers IBEW Local 1464 (Kansas City Power)*, 275 NLRB 557, 558 (1985).

<sup>69</sup> For example, the parties could have agreed to increasing the number of employees who could be retained when a steward was laid off, and/or to the appointment of an alternate steward, and/or to authorizing someone other than or in addition to the steward (for example, Zeller) to attach union labels.

<sup>70</sup> Likewise identical to the expiring contract are provisions in the successor contract with respect to the appointment of stewards by the Union's business manager or business representative. There is no evidence that Respondent or anyone else made any efforts to alter these provisions either. However, the Association would likely be unable to compel the Union to bargain about them.

protected activity.<sup>71</sup> Respondent has failed to make such a showing.

Thus, between the time that Ziegler made his February 18 report to Ziegler about Zeller's altercation with Taylor and Ziegler's February 19 action in discharging her, by Ziegler's own admission his information about that altercation was limited to what Zeller had told him. Nonetheless, as shown by Stiltner's and Taylor's credible testimony, about 4 hours before discharging her Ziegler told them that if she forswore her statutory rights to serve as steward, or if the Union removed her from that position, she would have a job as long as Respondent had work. Although Respondent contends that Ziegler's denial of such remarks should be credited, Stiltner's and Taylor's testimony is indirectly corroborated by the testimony of foreman Gordon (a witness for Respondent) that just before the February 19 shop meeting during which Gordon elicited from Stiltner the statement that Stiltner was not going to remove Taylor as steward, Ziegler told Gordon to have Stiltner come to Ziegler's office if Stiltner was not going to appoint someone other than Taylor as steward; and that Gordon had sent Stiltner to this meeting with Ziegler because Stiltner had not removed Taylor as steward. Indeed, Ziegler himself admitted that as of that time—after the altercation but before Taylor's discharge—a decision by Stiltner to remove her as steward would have been important to Ziegler, although such a decision by Stiltner would obviously be of no interest to Ziegler if he intended to discharge her even if she were removed as steward. Furthermore, when Stiltner arrived at Respondent's facility shortly after Zeller's report of the altercation, Ziegler said that he had not fired her, but that because she was emotionally upset she should not resume work until the next day; and later that day, Ziegler told Stiltner that he could solve "everybody's problem" by removing Taylor as steward, and that Stiltner should "think the matter over." Not until after ascertaining that Taylor would remain as steward unless she was discharged did Ziegler take steps to discharge her.

For the foregoing reasons, I conclude that Respondent violated Section 8(a)(3) and (1) of the Act by discharging Taylor. I would reach this conclusion entirely apart from the credited

evidence regarding statements made by Rudowski. However, I believe that such statements constitute probative evidence as to Respondent's motives in discharging Taylor. More specifically, I find that the following statements by Rudowski constitute probative evidence in support of the conclusion that Respondent discharged Taylor because she was a union steward, she would not resign from that position, and Stiltner would not remove her: (1) Rudowski's statements to Taylor on August 20 or 21, 1997, that if Taylor resigned as steward she would not be fired or laid off or transferred; (2) Rudowski's statement later that day to union business agent Frazier that if Taylor resigned as union steward, she would work for Respondent as long as it had work; and (3) Rudowski's statement to Frazier on February 19, 1998, after Taylor's altercation with Zeller but before she was discharged, that she would be discharged if Frazier did not replace her as a steward, but would not be discharged if he did remove her as a steward.

A finding that Rudowski was acting as Respondent's agent in making these statements can be inferred from the circumstances. *Behring International, Inc.*, 252 NLRB 354, 363 (1980);<sup>72</sup> *Hit 'N Run Food Stores*, 231 NLRB 660, 669 (1977). The credible evidence calls for such an inference. Thus, Rudowski's statements to Taylor on August 20 or 21 were very close indeed to what Ziegler had already told her: More specifically, Rudowski said that Ziegler would not accept anyone but Zeller for the steward's position and that if Taylor resigned as steward, she would not be laid off, fired, or transferred. Similarly, Ziegler had told her that nobody was going to tell him who "my steward" was going to be; that Zeller's friendship with the old business agent was Stiltner's only reason for removing Zeller; that Ziegler would send Taylor out into the field, where she could no longer be the shop steward, in order to get rid of her; that if Taylor did not tell Stiltner she was resigning as business agent she would continue to receive job assignments which she was unable to perform and which she would not have been given if she had not been appointed steward; upon Taylor's representation that Stiltner was going to appoint someone else as steward, that she would have a job as long as Ziegler had work; and because of her action in signing for the union labels and thereby precluding Respondent from transferring her to a field job where she could no longer be the shop steward, that "this is war." Similarly corresponding to Ziegler's statements to Taylor were Rudowski's statements to union business agent Frazier, after the Rudowski-Taylor conference in Respondent's plant, that if Taylor resigned as union steward, she would work for Respondent as long as it had work. The coincidence between Rudowski's and Ziegler's statements to Ziegler, and Ziegler's action in arranging for this interview between her and Rudowski by telling her to talk to Rudowski during working hours in a room to which Ziegler had already sent Rudowski, point to the accuracy of Rudowski's testimony (which I therefore credit) at one point that Ziegler "called and asked me to come down" to talk to Taylor about her problem at

<sup>71</sup> *Architectural Glass & Metal Corp. v. NLRB*, 107 F.3d 426, 431 (6th Cir. 1997); *McGaw of Puerto Rico*, 322 NLRB 438, 452 (1996), enf'd. 132 F.2d 30 (1st Cir. 1997). R. Br. misconceives both these cases and the cases cited supra fn. 64. Respondent states (Br. p. 16 fn. 5): "The General Counsel argues that [Respondent] wanted to remove Taylor as steward because it did not like her. . . . Even assuming this is true, the Act does not make it unlawful for an employer to terminate an employee based on a personality conflict." However, a prima facie showing of a Sec. 8(a)(3) and (1) violation would be made out by a showing that the employer had discharged an employee at least partly because she had become a union steward, and the employer's previous willingness to retain her even though it disliked her would virtually preclude the employer from being able to establish, by a preponderance of the evidence, that it would have discharged her for that reason even if she had not become a union steward. I need not and do not consider the Union's seeming contention that a discharge even partly because the employee is a steward is inherently destructive of important employee rights and violates the Act even if the employer can preponderantly show that the employee would have been discharged anyway for lawful reasons.

<sup>72</sup> Mod. 675 F.2d 83 (3d Cir. 1982); Board's petition for cert. granted, judgment vacated, and remanded, 462 U.S. 1126 (1983); enf'd. 714 F.2d 291 (3d Cir. 1983); employer's petition for cert. denied 464 U.S. 1071 (1984).

the firm.<sup>73</sup> Further evidencing Rudowski's authority to make such statements are Ziegler's admission that Rudowski joined with Ziegler, Frazier, Stiltner, and Biggs in the September 1997 "mutual agreement" that Taylor would stay on as steward, and Ziegler's failure (so far as the record shows) to disavow Rudowski's statement in Ziegler's presence during that same meeting that Ziegler had authorized Rudowski to try and get "this problem with [Taylor] resolved." Further, when telling union business agent Frazier that Taylor's ability to retain her job would be improved if she were no longer the steward, Rudowski said that he was representing Ziegler and Respondent. Respondent's continued contact with Rudowski about its intent to discharge Taylor is shown by Rudowski's action in telephoning union business representative Frazier about the matter the very morning after Taylor's altercation with Zeller on the afternoon of February 18, and the morning of the same day as Taylor's discharge in the afternoon of February 19 (cf. *supra* fn. 49). Moreover, the substance of this message to Frazier from Rudowski was the same as Ziegler's statement to Stiltner and Taylor that afternoon and before her discharge—namely, that she would be discharged if she remained as steward but would keep her job if she did not remain as steward. Finally, it is inherently unlikely that Rudowski would repeatedly make such statements (in August 1996, and again in February 1997) without Respondent's authority. Rudowski had been the Association's principal officer for more than 20 years. Although he has never been employed by Respondent, the Association's expenses (including his salary and fringe benefits) are paid for by the Association's contractor members, including Respondent. His duties include the appointment of "management representatives" on the "board" for Step Two of the grievance procedure; he sometimes names himself as such a representative. If he has not named himself to the "board," he usually participates in the hearing as a representative of the contractor. (However, before the grievance regarding Taylor's discharge, Respondent had never been the subject of a grievance hearing and, so far as the record shows, had never been represented by Rudowski at a grievance hearing.) In addition, during contract negotiations, Rudowski chairs the meeting for management, and consults with members of the Association in developing proposals to submit to the Union. The bargaining agreement in effect when Taylor was discharged (as well as the successor agreement) authorizes the Association to act as Respondent's collective-bargaining representative for "all matters relating to this Agreement"; as previously noted, both of these agreements state that the Union's business manager or business representative "may appoint [as] stewards. . . whomever they deem necessary." Moreover, Rudowski signed both of these agreements on the Association's behalf. Rudowski testified that at all material times he knew that Taylor was the union steward for Re-

spondent's shop. It is highly improbable that a man with Rudowski's experience and responsibilities would make the representations to Taylor and other union representatives which he repeatedly made—that Respondent would discharge her if she remained as steward, but would retain her if she no longer occupied that post—without receiving authorization from Respondent to make such representations. I find that Rudowski did have such authorization, and I do not believe his or Ziegler's testimony otherwise. Accordingly, I find that these statements by Rudowski provide additional support for my conclusion that Respondent discharged Taylor because she would not resign as union steward and the union business representative refused to remove her from that job. *Weco Cleaning Specialists*, 308 NLRB 310, 315, 318–319 (1992); *Behring International*, supra, 252 NLRB at 363, 365–366.

#### CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent has violated Section 8(a)(1) of the Act by telling employee Rosemary Taylor, through supervisor Ziegler, that she would be discharged if she were not removed from the position of union steward.
4. Respondent has violated Section 8(a)(3) and (1) of the Act by discharging employee Rosemary Taylor.
5. The unfair labor practices described in Conclusions of Law 3 and 4 affect commerce within the meaning of Section 2(6) and (7) of the Act.

#### THE REMEDY

Having found that Respondent has violated the Act in certain respects, I shall recommend that Respondent be required to cease and desist from such conduct, or like and related conduct, and to take certain affirmative action necessary to effectuate the policies of the Act. Thus, Respondent will be required to offer Rosemary Taylor reinstatement to her former position, or, if such a position no longer exists, to a substantially equivalent position, and to make her whole for any loss of earnings and other benefits she may have suffered by reason of her unlawful termination, as prescribed in *F.W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 263 NLRB 1173 (1987). In addition, Respondent will be required to expunge from its records all references to Taylor's unlawful termination and to notify her in writing that this has been done and that the actions and matters reflected in these documents will not be used against her in any way. Also, Respondent will be required to post appropriate notices.

On the basis of these findings of fact and conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I issue the following recommended Order.<sup>74</sup>

<sup>73</sup> Even if unreservedly credited, Rudowski's other testimony about his conversation with Ziegler shows that Ziegler at least impliedly asked Rudowski to come down and talk to Taylor. To the extent inconsistent with Taylor's and Rudowski's testimony, I do not credit Ziegler's largely evasive testimony that "I don't believe" he ever asked her to meet with Rudowski, that Ziegler did not "recall" how she came to meet with Rudowski on company premises, and that Ziegler did not ask Rudowski to meet with her.

<sup>74</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board, and all objections to them shall be deemed waived for all purposes.

## ORDER

Respondent Limbach Company, its officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Threatening employees with discharge if they are not removed from the position of union steward.

(b) Discouraging membership in Sheet Metal Workers Local 24, International Association, AFL-CIO, by discharging employees, or by otherwise discriminating in regard to hire or tenure of employment or any term or condition of employment.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Within 14 days from the date of this Order, offer Rosemary Taylor full reinstatement to her former position or, if such a position no longer exists, a substantially equivalent position, without prejudice to her seniority or any other rights and privileges previously enjoyed.

(b) Make her whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of this Decision.

(c) Within 14 days from the date of this Order, remove from its files all references to Rosemary Taylor's unlawful termination, and within 3 days thereafter, notify her in writing that this has been done and that the action and matters reflected in these documents will not be used against her in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents, for examination and copying, all

payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary or useful in analyzing the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by Region 9, post at its facility in Columbus, Ohio, copies of the attached notice marked "Appendix."<sup>75</sup> Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at its Columbus facility at any time since February 18, 1997.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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<sup>75</sup> In the event that the Board's Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall be changed to read, "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."